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UNITED STATES COPYRIGHT ROYALTY JUDGES

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IN THE MATTER OF:) Docket No.
) 2012-6 CRB CD
DISTRIBUTION OF THE 2004-2009) (2004-2009)
CABLE ROYALTY FUNDS) (Phase II)

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IN THE MATTER OF:) Docket No.
) 2012-7 CRB SD
DISTRIBUTION OF THE 1999-2009) (1999-2009)
CABLE ROYALTY FUNDS) (Phase II)

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CONDENSED TRANSCRIPT WITH KEYWORD INDEX

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<p style="text-align: right;">494</p> <p>1 UNITED STATES COPYRIGHT ROYALTY JUDGES 2 The Library of Congress 3 Washington, D.C. 4 -----X 5 IN THE MATTER OF:) Docket No. 6) 2012-6 CRB CD 7 DISTRIBUTION OF THE 2004-2009) (2004-2009) 8 CABLE ROYALTY FUNDS) (Phase II) 9 -----X 10 IN THE MATTER OF:) Docket No. 11) 2012-7 CRB SD 12 DISTRIBUTION OF THE 1999-2009) (1999-2009) 13 CABLE ROYALTY FUNDS) (Phase II) 14 -----X 15 BEFORE: THE HONORABLE SUZANNE BARNETT 16 THE HONORABLE JESSE M. FEDER 17 THE HONORABLE DAVID R. STRICKLER 18 19 Library of Congress 20 Madison Building 21 101 Independence Avenue, S.E. 22 Washington, D.C. 23 May 24, 2018 24 25 9:35 a.m. VOLUME III Reported by: Karen Brynteson, RMR, CRR, FAPR</p>	<p style="text-align: right;">496</p> <p>1 APPEARANCES (Continued): 2 On behalf of Settling Devotional Claimants: 3 MATTHEW J. MacLEAN, ESQ. 4 Pillsbury Winthrop Shaw Pittman LLP 5 1200 Seventeenth Street, N.W. 6 Washington, D.C. 20036 7 202-663-8183 8 9 ALSO PRESENT: 10 SAMUEL MEREDITH 11 RAUL GALAZ (via phone) 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">495</p> <p>1 A P P E A R A N C E S: 2 On behalf of Independent Producers Group: 3 BRIAN D. BOYDSTON, ESQ. (Via phone) 4 Pick & Boydston, LLP 5 10786 Le Conte Avenue 6 Los Angeles, CA 90024 7 213-624-1996 8 9 On behalf of MPAA and Program Suppliers: 10 GREGORY O. OLANIRAN, ESQ. 11 LUCY HOLMES PLOVNICK, ESQ. 12 ALESHA M. DOMINIQUE, ESQ. 13 DIMA BUDRON, ESQ. 14 Mitchell Silberberg & Knupp LLP 15 1818 N Street, N.W., 8th Floor 16 Washington, D.C. 20036 17 202-355-7917 18 19 On behalf of Settling Devotional Claimants: 20 ARNOLD P. LUTZKER, ESQ. 21 BENJAMIN S. STERNBERG, ESQ. 22 Lutzker & Lutzker LLP 23 1233 20th Street, N.W., Suite 703 24 Washington, D.C. 20036 25 202-408-7600</p>	<p style="text-align: right;">497</p> <p>1 P R O C E E D I N G S 2 (9:35 a.m.) 3 JUDGE BARNETT: Good morning. Please 4 be seated. We've been monkeying around with 5 the sound system, so I hope everything works 6 properly today. 7 We are here for closing arguments in 8 the matter of Distribution of Cable Royalty 9 Funds for the period 2004 to 2009 and Satellite 10 Royalty Funds for the period 2000 to 2009. 11 Although 1999 is still in the caption of the 12 case. 13 And I understand that Mr. Boydston is 14 appearing by phone. Mr. Boydston, are you 15 there? 16 THE CLERK: No, I didn't -- 17 JUDGE BARNETT: Oh. 18 THE CLERK: No, I'll get his started 19 right now. 20 JUDGE BARNETT: Thanks. 21 MR. BOYDSTON: Good morning. Brian 22 Boydston. 23 JUDGE BARNETT: Good morning, 24 Mr. Boydston. It's Judge Barnett. We are 25 about ready to begin.</p>

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<p>1 Let's have appearances for the record 2 beginning with Mr. Olaniran and company. 3 MR. OLANIRAN: Greg Olaniran for 4 MPAA-represented Motion Picture -- 5 MPAA-represented Program Suppliers. I haven't 6 had my coffee yet. 7 (Laughter.) 8 JUDGE BARNETT: And you'll be the one 9 delivering the closing argument, will you, 10 Mr. Olaniran? 11 MR. OLANIRAN: Yes, Your Honor. 12 JUDGE BARNETT: Okay. 13 MS. PLOVNIK: Lucy Plovnick for 14 MPAA-represented Program Suppliers. 15 MS. DOMINIQUE: Aleshia Dominique for 16 MPAA-represented Program Suppliers. 17 MS. BUDRON: Dima Budron for 18 MPAA-represented Program Suppliers. 19 MR. MacLEAN: Matt MacLean 20 representing the Settling Devotional Claimants. 21 MR. LUTZKER: And Arnold Lutzker for 22 Settling Devotional Claimants. 23 MR. STERNBERG: Ben Sternberg for 24 Settling Devotional Claimants. 25 MR. MEREDITH: Samuel Meredith for</p>	<p>1 (Loud sound coming through phone 2 system.) 3 JUDGE STRICKLER: Do you always get 4 that, Mr. MacLean, when you stand up? 5 (Laughter.) 6 MR. MacLEAN: That was -- that was 7 exciting. So, Your Honor, in your post-hearing 8 order, the time was allocated; 30 minutes for 9 Settling Devotional Claimants, 60 minutes for 10 MPAA-represented Program Suppliers, and 60 11 minutes for IPG, with the opportunity to 12 reserve time for rebuttal to be followed in the 13 same order as the closing presentation. 14 JUDGE BARNETT: And is that your 15 anticipated order of presentation of arguments 16 as well; Devotional Claimants, followed by 17 Program Suppliers, followed by IPG? 18 MR. MacLEAN: Yes, Your Honor. 19 JUDGE BARNETT: Okay. And we'll wait 20 to hear from Mr. Boydston that he has his 21 client on-line. 22 MR. BOYDSTON: This is Brian Boydston, 23 and I have now conferenced in Raul Galaz from 24 Independent Producers Group. 25 JUDGE BARNETT: Thank you. Good</p>
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<p>1 Settling Devotional Claimants. 2 MR. MacLEAN: Mr. Meredith is a law 3 clerk for Mr. Lutzker, and so we're very 4 pleased to have him here to observe today. 5 JUDGE BARNETT: What a lucky chap. 6 And I see we have some visitors in the back. 7 MR. LAANE: Good morning, Your Honor. 8 Good to see you again. Just here as an 9 interested observer today. 10 MR. PAREKH: I'm Rohan Parekh, summer 11 associate for Hammerman PLLC, and I'm observing 12 as well. 13 JUDGE BARNETT: Okay. Welcome. 14 And, Mr. Boydston, you are now on the 15 phone and have you looped in your client? 16 MR. BOYDSTON: I was going to, just 17 after I introduced myself. Brian Boydston on 18 behalf of Independent Producers Group. And if 19 you give me about ten seconds, I will bring in 20 Raul Galaz from International -- or, excuse me, 21 Independent Producers Group. 22 JUDGE BARNETT: We will give you those 23 ten seconds, while I ask how the appearing 24 parties have decided to allocate time and order 25 of presentation.</p>	<p>1 morning, Mr. Galaz. Can you hear us? 2 MR. GALAZ: Yes, I can. Can you hear 3 me? 4 JUDGE BARNETT: We can hear you as 5 well. Thank you. 6 Mr. MacLean, are you reserving for 7 rebuttal? 8 MR. MacLEAN: If I can reserve five 9 minutes, Your Honor. 10 JUDGE BARNETT: You may. Okay. 11 MR. MacLEAN: Thank you, Your Honor. 12 CLOSING ARGUMENT BY COUNSEL FOR 13 SETTLING DEVOTIONAL CLAIMANTS 14 MR. MacLEAN: First, I do want to say 15 thank you for the opportunity to address your 16 questions and concerns held over from the prior 17 time we had this proceeding. 18 I do realize that there have been 19 frustrations on both sides, yours and ours, 20 about the pace of this case, in particular, and 21 some of the obstacles that I will say have 22 emerged during the case. 23 But I do strongly think that when we 24 have this interchange, where the parties can 25 know what you're thinking and try to respond to</p>

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1 your concerns, I do think that is when we are
2 at our best and can be the most focused in our
3 presentations and the most effective in the
4 pursuit of truth.

5 In my closing, I want to basically go
6 through three topics. The first one, I'd first
7 like to address why we believe that the Judges
8 should act in accordance with prior decisions.
9 And just as a preview, it's going to come back
10 to our three C's, of confidence, consistency,
11 and certainty.

12 Second, I'm going to focus
13 specifically to address the questions and
14 concerns that the Judges have raised; namely,
15 whether -- with respect to our methodology,
16 whether February is reliable, is a reliable
17 basis for an award for the years 1999 through
18 2003, and, secondly, whether local ratings are
19 predictive of distant viewership.

20 And then, finally, I'm going to come
21 back to confidence, consistency, and certainty,
22 and I'm going to address why we believe the
23 Judges should not downgrade an award based
24 solely on possible imperfections in
25 methodology, absent evidence that those -- that

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1 whatever flaws there are in a methodology are
2 favoring the party that's presenting that
3 methodology in some systematic way.

4 So, first, confidence, consistency,
5 and certainty. As I've said before, the Judges
6 are required by statute to act in accordance
7 with prior determinations and the Judges have
8 precedent on this issue from a couple of cases,
9 but I'll point specifically to the 1998 to 1999
10 Phase I determination in which the Judges'
11 predecessors made the point that the tribunal
12 should follow -- act in accordance with prior
13 determinations, that is to say, that includes
14 methodological determinations, except in two
15 circumstances.

16 One, if there are changed
17 circumstances from a prior proceeding, or, two,
18 if there's evidence on the record before them
19 that requires prior conclusions to be modified.
20 And in this case, we absolutely do not have any
21 evidence on the record that would require your
22 prior cases relating to use of viewership in
23 Phase II circumstances to be revisited. And,
24 in fact, IPG has presented no affirmative
25 evidence on the record at all.

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1 JUDGE STRICKLER: The 1998-1999 case
2 that you're referring to is the allocation
3 Phase I determination; is that right?

4 MR. MacLEAN: That's correct. And in
5 this case, the Judges' predecessors discussed
6 the circumstances in which the tribunal will
7 depart from review of prior methodology in
8 order to make changes to a methodology or to
9 adopt a new methodology.

10 Nothing is written in stone. You can
11 depart from prior determinations. But the
12 prior determinations should be a starting point
13 because change should be evolutionary. You are
14 in essence governing an industry here. There
15 are -- in the ways that the parties put
16 together -- construct their methodologies and
17 seek data and so forth, we do rely on prior
18 cases.

19 We do -- and there are other reliance
20 factors involved. So that's why change should
21 be evolutionary as a general matter, and at
22 least as a starting point, you should rely on
23 your -- on your prior -- on your prior
24 determinations.

25 Now, IPG in this case makes the same

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1 point. On pages 50 through 55 of IPG's
2 proposed conclusions of law, which I must say
3 was an absolute tour de force and excellently
4 written, we couldn't have said it better
5 ourselves.

6 In fact, we didn't say it better
7 ourselves when we wrote the exact same six
8 pages in our proposed conclusions of law from
9 the allocation phase that we just recently had.

10 So that remarkably even though they
11 went through all the trouble of signing their
12 name to our work, they didn't take the next
13 step to actually discuss any of the actual
14 precedents, the actual prior determinations in
15 the Phase II context in which the Judges have
16 adopted viewership or viewership-based
17 methodologies as a distribution methodology.

18 JUDGE STRICKLER: So it wasn't
19 immediately evident, but your tour de force
20 comment was with your tongue in your cheek; is
21 that right?

22 MR. MacLEAN: I think it would be fair
23 to say, Your Honor.

24 JUDGE STRICKLER: Okay. It was very
25 well disguised.

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<p>1 MR. MacLEAN: Thank you.</p> <p>2 JUDGE STRICKLER: I don't know that</p> <p>3 that was a compliment, but okay.</p> <p>4 MR. MacLEAN: IPG did not go on to</p> <p>5 discuss those very -- the very prior</p> <p>6 determinations that we would propose that the</p> <p>7 Judges follow. Those determinations, I'm</p> <p>8 thinking primarily about the 2000-2003 case, in</p> <p>9 which the Judges adopted a methodology very</p> <p>10 similar to the one MPAA has proposed in this</p> <p>11 case, and the Judges' decision in the 1999</p> <p>12 cable case, in which a methodology was adopted</p> <p>13 that is very similar to the methodology that we</p> <p>14 are proposing, that the SDC are proposing in</p> <p>15 this case.</p> <p>16 So -- and, of course, those -- those</p> <p>17 determinations, with respect to</p> <p>18 viewership-based methodologies, were both</p> <p>19 affirmed by the D.C. Circuit. So those are the</p> <p>20 precedents that we believe the Judges should</p> <p>21 follow in this case. And, of course, IPG has</p> <p>22 presented no other methodology, no rebuttal</p> <p>23 case to the methodologies that have been</p> <p>24 presented in this case.</p> <p>25 So now to focus on our answers to the</p>	<p>1 quarter-hour-level estimates or broadcast-level</p> <p>2 estimates. And it's not true that that was</p> <p>3 revealed at the first time in the -- in the</p> <p>4 proceeding. It's right in Dr. Erdem's written</p> <p>5 direct statement, Exhibit 7000 at pages 13 to</p> <p>6 14.</p> <p>7 And he gives -- he explains that and</p> <p>8 he also gives reasons why. And, in short, you</p> <p>9 can think of it like this: Which subscriber is</p> <p>10 the cable system going to value more, the</p> <p>11 subscriber who watches four hours of</p> <p>12 programming every evening, every day of the</p> <p>13 week, or the subscriber that watches an hour</p> <p>14 every Sunday morning? Which one is the cable</p> <p>15 system going to value more?</p> <p>16 And if you think about it -- and which</p> <p>17 of those two subscribers is more likely to drop</p> <p>18 their subscription if there's a change in the</p> <p>19 program line-up? And if you think about it,</p> <p>20 you'll see it's just not plausible that a</p> <p>21 four-hour -- that the four-hour-per-day</p> <p>22 television watching subscriber is 28 times as</p> <p>23 valuable as the one-hour-a-day or</p> <p>24 one-hour-per-Sunday watching subscriber.</p> <p>25 And that's -- that's why we don't</p>
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<p>1 Judges' questions, the SDC methodology, we want</p> <p>2 to make clear, our methodology, although like</p> <p>3 MPAA's methodology, is based on -- ultimately</p> <p>4 on estimates of local viewership, is not MPAA's</p> <p>5 methodology. It's more similar, as I said, to</p> <p>6 the methodology that was adopted in the 1999</p> <p>7 cable case.</p> <p>8 And just to review, our methodology is</p> <p>9 based on average local ratings from the reports</p> <p>10 on Devotional programming, scaled by the number</p> <p>11 of distant subscribers. It's a classic value</p> <p>12 times volume approach.</p> <p>13 JUDGE STRICKLER: When you mention</p> <p>14 1998-'99 now, are you still referring to the</p> <p>15 Phase I allocation or are you now referring to</p> <p>16 Phase II?</p> <p>17 MR. MacLEAN: I should have said 1999</p> <p>18 Cable Phase II.</p> <p>19 JUDGE STRICKLER: Thank you.</p> <p>20 MR. MacLEAN: That's the decision I'm</p> <p>21 referring to in this context.</p> <p>22 Now, IPG, IPG claims in its findings</p> <p>23 of fact and conclusions of law that Dr. Erdem</p> <p>24 revealed for the first time at the hearing that</p> <p>25 we're not using -- unlike MPAA, we're not using</p>	<p>1 think that either the length of the programs or</p> <p>2 the -- or the frequency with which the programs</p> <p>3 are aired, provided that they are on on a</p> <p>4 regular, predictable basis, is the -- is the</p> <p>5 relevant measure of volume. Rather, we would</p> <p>6 look at the popularity of a program within a</p> <p>7 genre as a measure of how likely it is that</p> <p>8 those -- that program is attracting and</p> <p>9 retaining subscribers.</p> <p>10 So to get to the Judges' questions,</p> <p>11 your first question, is February -- because we</p> <p>12 only have the full RODPs for February of 1999</p> <p>13 through 2003, whether that's predictive of</p> <p>14 other sweep months.</p> <p>15 So it is true that we only -- we still</p> <p>16 only use the February reports for 1999 through</p> <p>17 2003 because we don't have -- because where we</p> <p>18 only have the R-7 summaries, we don't have the</p> <p>19 details backing them up that Dr. Erdem does use</p> <p>20 them in some cases.</p> <p>21 Again, IPG says this was only revealed</p> <p>22 for the first time at the hearing. Absolutely</p> <p>23 not true. It's on page 17 of Dr. Erdem's</p> <p>24 written direct testimony, and also on page 21</p> <p>25 of the written direct testimony, Dr. Erdem</p>

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1 presents alternative sensitivity tests in which
2 he shows what would have happened if we had
3 used all of our R-7 pages from all the months
4 in those years and another sensitivity test in
5 which he shows how the results would have
6 differed if we only used February reports for
7 all years at issue in this proceeding.

8 So not only did we -- was it clearly
9 set forth in the testimony, he also presents
10 these sensitivity tests.

11 We made a comprehensive search to try
12 to answer the Judges' questions. We made a
13 comprehensive search for data. We looked
14 everywhere we could look. We -- if there is
15 anything else out there, it is simply not
16 accessible to us.

17 We now have either the full -- the
18 full RODP or at least the R-7 summary pages for
19 all sweep months throughout these entire years
20 covered by this proceeding, except for eight.
21 So all but eight sweep months we have covered
22 either by a full RODP or the R-7 pages.

23 And Dr. Erdem has presented multiple
24 analyses showing that February -- that the
25 ratings are -- remain relatively stable over

1 programs that are claimed or, more accurately,
2 all program titles that are claimed in these
3 proceedings, but the bottom line is there is
4 simply no evidence of value of those SDC and
5 IPG programs that don't appear in the RODPs.
6 They are predominantly specials, other one-off
7 programs that are not scheduled on a regular
8 basis.

9 And you can think about it this way:

10 If I'm a participant in the market and I go to
11 a cable system operator saying, hey, listen,
12 I've got a program to sell you. Now, I don't
13 know when it's going to be on or even if it's
14 going to be on, I don't know if anybody
15 actually watches it, but, hey, it has got a
16 great title. So do you want to buy it?

17 He's going to tell me to get lost.

18 Okay?

19 Absence of information in this context
20 is absence of value because what are you
21 selling if you have no information? So we're
22 not going to speculate as to the value of these
23 programs that are not scheduled on a regular
24 basis.

25 If there were evidence of value, this

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1 time, that February is predictive of later
2 months of the year, and, of course, he has
3 presented the sensitivity test that I've just
4 described.

5 And bottom line is there just isn't
6 more data out there for these -- for these
7 years, or if it is, it's not in our -- in our
8 reach. IPG has presented no analysis, no
9 rebuttal to Dr. Erdem's analyses here.

10 Your second question was whether local
11 ratings are predictive of distant viewing.

12 The first point I want to make here is
13 that with respect to our local ratings, the
14 ratings that are in our RODPs, we do not have a
15 critical lack of data. We have the -- our
16 local ratings, our average local ratings cover
17 the universe of stations, the universe of
18 markets. We don't -- we don't conduct our own
19 regressions to try to project local ratings.

20 We're using the actual data, the
21 actual Nielsen reports that are used in the
22 markets. And these are the actual, the actual
23 ratings that are used by participants in the
24 markets.

25 It is true that we do not have all

1 was IPG's opportunity to present it. They
2 didn't present any evidence of value. And
3 we're not going to speculate. We don't think
4 IPG should speculate. And we don't think that
5 the Judges should speculate either.

6 And, of course, in the Judges' 1999
7 cable Phase II decision, this is what the
8 Judges said too, there is no basis for an award
9 absent any evidence of viewing. And that's
10 exactly what we have with respect to these
11 one-off programs that don't appear in the
12 RODPs.

13 So that's our local viewing
14 information. Our distant viewing information
15 -- I'm going to acknowledge right off the bat
16 -- it's good; it's not great, okay? We've
17 always acknowledge the limitations of these
18 HHVH studies. Most notably, the limitation
19 that it's based on a non-random station sample,
20 which we've always acknowledged is a problem.

21 Now, that being said, we don't buy at
22 all this zero viewing criticism that IPG raises
23 perennially. There is a problem if you've got
24 missing data that you're -- that you're not
25 correctly distinguishing from zeros, but zeros

<p style="text-align: right;">514</p> <p>1 are actually data points that can be used 2 effectively.</p> <p>3 And this -- and when we're dealing 4 with sweep data, which is what the HHVH data 5 is, we're not -- we don't have a missing data 6 problem because every single market has an 7 adequate sample size to measure local viewing 8 in that market.</p> <p>9 So zeros are real data points. We 10 don't buy that argument. Still, we recognize 11 there are limitations in the distant viewing 12 data we have, which is precisely why we don't 13 rely principally on that distant viewing data. 14 We rely principally on our industry experts, 15 Ms. Berlin, an expert in cable and satellite 16 programming who worked for DISH satellite 17 company, and Mr. Sanders, an expert appraiser, 18 who has been involved in thousands of 19 appraisals for his decades of experience.</p> <p>20 And these are industry professionals 21 who make judgments of value based on 22 information such as we rely on, and they have 23 testified, yes, you can predict how a program 24 will perform in one market based on performance 25 in its local market. That's particularly true</p>	<p style="text-align: right;">516</p> <p>1 agree that within a niche category of 2 programming, you can rely on viewership as a 3 measure of relative value, and they also both 4 agree that you can use viewership in one 5 market, in a local market, to predict value and 6 viewership in another market, especially if 7 it's, as typically is in the case here, a 8 neighboring market.</p> <p>9 So back here to data analysis, because 10 that's what your question focused on, we've now 11 -- we now have distant viewing data, the HHVH 12 distant viewing data, sweeps data for every 13 year, 1999 through 2003. After 2003, it is 14 simply not available. It's not accessible to 15 us.</p> <p>16 Now -- and there is no more reliable 17 distant viewing sweeps data that we can get. 18 Now, MPAA, I have to -- I was a little 19 surprised in MPAA's response. They -- they do 20 take us to task a little bit, and now I have to 21 respond to it.</p> <p>22 MPAA responds by saying their National 23 People Meter data covers all markets. And I 24 need to -- I'm going to try to address this 25 point with a single five-syllable word. And</p>
<p style="text-align: right;">515</p> <p>1 with regard to what is predominantly 2 neighboring markets. So we rely principally on 3 Ms. Berlin and Mr. Sanders.</p> <p>4 By the way, while we're on the subject 5 of expertise of Mr. Sanders, IPG complains, 6 well, he has never advised a cable system on 7 whether to acquire a distant signal. That's 8 completely beside the point. Mr. Sanders is 9 not a programmer. Mr. Sanders is an appraiser. 10 To be an appraiser in an industry, you have to 11 understand some things about that industry. 12 But that doesn't mean that you've used an 13 appraiser to make programming decisions.</p> <p>14 Think about this: If you're -- are 15 you going to hire a home appraiser to design 16 your kitchen? No. A home appraiser needs to 17 know something about kitchen design, but 18 there's another profession of people who will 19 design kitchens for you. Same thing here. Mr. 20 Sanders is an appraiser. He specializes in 21 assessing value of media assets, including 22 television programming.</p> <p>23 We have Ms. Berlin who is our 24 programmer, our programming expert, and she has 25 testified too that -- and both of these experts</p>	<p style="text-align: right;">517</p> <p>1 that word is geo-stratified.</p> <p>2 And, Brian, for the record, I'm 3 holding up a sign that says geo-stratified on 4 it.</p> <p>5 And this is addressed in -- in the 6 transcript on page 362. And, basically, in a 7 geo-stratified sample, such as what is used in 8 the National People Meter sample, and I'm 9 quoting here, "some geographical areas would be 10 included and other geographical areas only have 11 a chance to be included."</p> <p>12 So it is misleading to say that 13 National People Meter data is available in all 14 markets. All markets are included in the 15 sampling process, but the geo-stratified sample 16 is going to have instances of missing -- of 17 missing data for some stations.</p> <p>18 So on this limited, very limited, 19 point, IPG is sort of right. It is a 20 non-random sample, non-random on a geographical 21 basis. And so we are not going to be using 22 National People Meter data in our own 23 presentation of our viewership study.</p> <p>24 JUDGE STRICKLER: You said IPG; wasn't 25 that right? I thought you said this was an</p>

<p style="text-align: right;">518</p> <p>1 MPAA criticism.</p> <p>2 MR. MacLEAN: No. I'm saying IPG on</p> <p>3 this one point.</p> <p>4 JUDGE STRICKLER: On that point?</p> <p>5 MR. MacLEAN: On their criticism of</p> <p>6 MPAA's. I do agree with IPG, it is a</p> <p>7 non-random. It is a non-random sample,</p> <p>8 non-random on a geographical basis, because of</p> <p>9 this geo-stratification of the NPM sample.</p> <p>10 There may be other issues with the</p> <p>11 National People Meter data. I'm not going to</p> <p>12 get into them. This was sufficient for us to</p> <p>13 say, okay, this is not, you know, data that</p> <p>14 we're going to be able to use effectively with</p> <p>15 our methodology.</p> <p>16 So back to confidence, consistency,</p> <p>17 certainty. Our methodology is good. We have a</p> <p>18 good methodology. It is absolutely consistent</p> <p>19 with precedent.</p> <p>20 We would ask you -- of course, we</p> <p>21 recognize it's not perfect because no</p> <p>22 methodology that you're ever going to be</p> <p>23 presented is perfect. And there are going to</p> <p>24 be flaws that people can point to.</p> <p>25 But what I'm going to ask you is not</p>	<p style="text-align: right;">520</p> <p>1 methodology, absent evidence that that</p> <p>2 methodology is presented in such a way to</p> <p>3 benefit the party that presented it.</p> <p>4 Our methodology is simple. There may</p> <p>5 be an instinct that we're trying to model a</p> <p>6 complex market, and that that, therefore,</p> <p>7 requires a complex methodology. But I'm going</p> <p>8 to submit to you that the opposite is true.</p> <p>9 A simple methodology that makes sense</p> <p>10 but that comports with common sense, that</p> <p>11 comports with appraisal practices, is more</p> <p>12 fair, more predictable, more certain, and less</p> <p>13 susceptible to manipulation and bias than</p> <p>14 something more complex.</p> <p>15 And we do think we've got a good,</p> <p>16 sensible methodology that the Judges -- that</p> <p>17 can give us a level of predictability of how</p> <p>18 the Judges are going to address this in the</p> <p>19 future, and once we have that level of</p> <p>20 predictability, you're going to see these cases</p> <p>21 settle a lot more often.</p> <p>22 So the SDC requests that you -- you</p> <p>23 know, one quick thing I should say, I did make</p> <p>24 a mistake. Ms. Berlin was employed by DirecTV</p> <p>25 and not DISH. I'm sorry, I confused the two.</p>
<p style="text-align: right;">519</p> <p>1 to put your thumb on the scales. Even though</p> <p>2 our methodology isn't perfect, it is good, and</p> <p>3 it is the best that we could do. We've done a</p> <p>4 comprehensive job in trying to get everything</p> <p>5 to you.</p> <p>6 And, most importantly, we've been very</p> <p>7 -- our methodology is very understandable.</p> <p>8 It's very transparent. And it's easy to</p> <p>9 explain.</p> <p>10 Absent evidence that we have done</p> <p>11 something to manipulate our methodology, for</p> <p>12 example through a selection of a model or</p> <p>13 selection of a data source, or in the absence</p> <p>14 of some evidence that our -- or in the absence</p> <p>15 of some evidence that our methodology</p> <p>16 systematically overstates our shares, it would</p> <p>17 not be -- it would not yield confidence,</p> <p>18 consistency, and certainty to try to downgrade</p> <p>19 it solely on that basis, solely on -- you know,</p> <p>20 without evidence that it's benefitting us in</p> <p>21 some way.</p> <p>22 It would be arbitrary and it would be</p> <p>23 unpredictable, most importantly, unpredictable</p> <p>24 to try to reduce an award solely on the</p> <p>25 identity of the party who offered a</p>	<p style="text-align: right;">521</p> <p>1 So, anyway, I want to, before I close out, I</p> <p>2 want to correct that.</p> <p>3 I think I still have a couple of</p> <p>4 minutes left, so I'd be happy to discuss</p> <p>5 Shapley value if anybody would like to. No?</p> <p>6 Okay.</p> <p>7 So, well, let me just say this on</p> <p>8 Shapley value: This is something that you've</p> <p>9 requested before, and we've done our best.</p> <p>10 It's not really possible to calculate a Shapley</p> <p>11 value, but we can predict certain features.</p> <p>12 And with a homogeneous -- a homogeneous</p> <p>13 category of programming, we have presented</p> <p>14 evidence, and we've presented evidence again in</p> <p>15 this proceeding, that the Shapley valuation</p> <p>16 would predict that the higher-rated programs</p> <p>17 within a homogeneous category of programs are</p> <p>18 going to be under-valued by a viewership</p> <p>19 methodology.</p> <p>20 And for this reason, the viewership</p> <p>21 methodology that we've presented is a floor for</p> <p>22 the higher-valued programs, and those are the</p> <p>23 SDC programs.</p> <p>24 So that evidence is in the record.</p> <p>25 It's not Shapley valuation, but it's a</p>

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<p>1 prediction based on Shapley valuation. 2 And so that's another reason why we do 3 not believe the Judges should reduce our award 4 based solely on perceived flaws in our 5 methodology, absent evidence that those flaws 6 are benefitting us in some systematic way. 7 So, finally, the SDC for these reasons 8 requests that you enter the proposed cable and 9 satellite awards that are listed in 10 Mr. Sanders' direct testimony, page 22 of 11 Exhibit 7001. They are also set forth in the 12 conclusions of our proposed findings of fact 13 and conclusions of law. 14 JUDGE BARNETT: Thank you, 15 Mr. MacLean. 16 MR. MacLEAN: Thank you. 17 JUDGE BARNETT: You have seven minutes 18 reserved for rebuttal. 19 MR. MacLEAN: Thank you. 20 JUDGE BARNETT: Good morning, 21 Mr. Olaniran. Are you reserving time for 22 rebuttal? 23 MR. OLANIRAN: Yes, Your Honor, I'll 24 reserve about 15 minutes. 25 JUDGE BARNETT: Fifteen?</p>	<p>1 you can rely upon for allocation of royalties 2 for '04 through '09 cable royalty funds and '00 3 through '09 satellite royalty funds. 4 On May 4th, 2016, you issued an order 5 reopening the record and scheduling further 6 proceedings for this allocation phase, and as 7 we understood your ruling in that order, your 8 concern was not so much with MPAA's 9 methodological approach as it was with the data 10 that supported the results that we proposed 11 that allocation be based on. 12 Specifically, you said that without 13 either contemporaneous data or competent 14 evidence that could persuade the Judges that 15 such data are not needed to produce reliable 16 results from our methodology, that you could 17 not rely on the record that was before you in 18 that earlier proceeding. 19 We now believe that -- although 20 Dr. Gray said in that proceeding that he 21 thought his -- the results of his methodology 22 were reliable, we now believe we've answered 23 the question that you raised in that May 4, 24 2016 order to satisfy you completely. 25 So my objective today, to keep it very</p>
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<p>1 MR. OLANIRAN: Yes. 2 JUDGE BARNETT: Okay. 3 MR. OLANIRAN: If needed. 4 CLOSING ARGUMENT BY COUNSEL FOR 5 MPAA-REPRESENTED PROGRAM SUPPLIERS 6 MR. OLANIRAN: Good morning, again, 7 Your Honors. My name is Greg Olaniran, and I 8 represent MPAA-represented Program Suppliers. 9 MPAA-represented Program Suppliers are 10 a subset of the Program Suppliers category. 11 And the group is, in fact, the largest subset 12 of the Program Suppliers category, consisting 13 not only of the MPAA-represented MPAA members 14 companies but also includes producers and 15 syndicators of television programming, series, 16 movies, non-sports, non-team sports 17 programming, and so on and so forth. 18 And the number of the rightsholders 19 that we represent directly and indirectly and 20 the breadth of the rightsholders' claims is 21 well documented in the record in this 22 proceeding, so I won't bore you with those 23 details. 24 This is the second bite at the apple, 25 if you will, for us to present evidence that</p>	<p>1 simple, I will go through the evidence that we 2 now have in this proceeding, and the question 3 after that in terms of -- at least in terms of 4 my remark is whether or not the evidence we now 5 have satisfies the questions that you raised, 6 the criteria that you set in the May 4 order. 7 Methodologically, our approach in this 8 further proceeding versus in the early 9 proceeding is substantially -- our approaches 10 are substantially similar. Our position here 11 as with the initial proceeding is that the 12 relative marketplace value standard is the 13 standard for allocating royalties, the 14 royalties in question. 15 Also, through Dr. Gray's testimony -- 16 excuse me -- we have presented evidence as we 17 did earlier, in the earlier proceeding, that 18 viewership is a proxy for marketplace value. 19 And, logically, we also believe that relative 20 viewership is a proxy for relative marketplace 21 value. 22 Moreover, you have adopted 23 viewing-based methodology for allocating 24 royalties in the 2000-2003 Phase II or 25 allocation proceeding, as it's now known. You</p>

<p style="text-align: right;">526</p> <p>1 found that distant viewership can be a 2 reasonable and directly measurable metric for 3 calculating relative market value of distantly 4 retransmitted programs. 5 As we did in the earlier proceeding, 6 for each year at issue, Dr. Gray performed a 7 multiple regression analysis, estimated the 8 distant viewing of every program claimed by IPG 9 and MPAA. He then aggregated those distant 10 viewing measurements to calculate the relative 11 viewing shares between MPAA and IPG. 12 So to perform his analysis, Dr. Gray 13 relied on four data sources, as I believe he 14 did in the earlier proceeding. For this 15 proceeding he relied on Cable Data Corporation 16 data, he relied on the Gracenote programming 17 data, he relied on the CRTC logs, which are the 18 Canadian Radio and Television and 19 Telecommunications programming logs, and then 20 he relied on various sets of Nielsen data. 21 The CDC data provided information 22 about cable systems and satellite operators 23 that retransmitted distant signals during the 24 royalty years in question. The information 25 included the call signs that were distantly</p>	<p style="text-align: right;">528</p> <p>1 Dr. Gray use his CRTC logs to eliminate from 2 consideration the programs that are of Canadian 3 origin because those programs are not 4 compensable within the Program Suppliers 5 category. 6 And the last data source that Dr. -- 7 perhaps the most important data source that 8 Dr. Gray used were the different sets of 9 Nielsen data. He used three different Nielsen 10 -- three different types of Nielsen data. 11 The first was he relied on -- he used 12 the 2000 through 2003 distant viewing diary 13 data for cable and satellite retransmitted 14 stations. I think he had available to him, as 15 we did earlier, the first quarter of 2004 diary 16 data for satellite, which he also used. 17 And then he used the -- we -- 18 following the order, we requested additional 19 data from Nielsen. And so for 2008, we had 20 distant viewing metered data for cable and 21 satellite, and then for 2009 we had distant 22 viewing data for cable and satellite. So we 23 had four additional sets of data. 24 And then as Dr. Gray also did in 2000 25 -- I mean in the earlier proceeding, we have</p>
<p style="text-align: right;">527</p> <p>1 retransmitted by each CSO and each satellite 2 carrier, the type of station, whether it's 3 commercial educational, network, or 4 independent, the number of subscribers that 5 each station reached, royalty fees, and so on 6 and so forth. 7 Dr. Gray used the CDC data to select 8 the samples for each year in each delivery 9 system for the years in question. 10 He then also utilized the Gracenote 11 data. And the Gracenote data provided 12 information on every program that was on each 13 of the samples that Dr. Gray selected. 14 The information included in the 15 Gracenote data included the start time of the 16 program, the duration of the program, the title 17 of the program, the title of the episode in 18 some cases, the program type, and all -- and 19 other detailed information. 20 And so Dr. Gray used that, used the 21 Gracenote programming data to identify titles 22 by MPAA and IPG, and he used certain 23 characteristics of the program data to -- as 24 inputs into his regression analysis. 25 And with respect to the CRTC logs,</p>	<p style="text-align: right;">529</p> <p>1 local ratings data for 2000 through 2009. 2 Now, just a word about Nielsen, which 3 -- it's really the cornerstone, Nielsen data is 4 the cornerstone of MPAA's analysis. 5 The custom analysis is the custom 6 analysis of an existing database of -- that 7 Nielsen had. And it is probably the most 8 direct information, at least in our view, the 9 most reliable information that you can get to 10 do -- to the extent that you commit to using 11 viewing, to using viewing as your methodology. 12 We -- in our view, we think it is the most 13 reliable information you can get, the National 14 People Meter, to get an extract of the National 15 People Meter based on what we're trying to 16 accomplish. 17 And the second point is that 18 Mr. Lindstrom has worked at Nielsen for 30-plus 19 years and for the better part of his career. 20 And he is -- at least within this proceeding, 21 in our view, he is the most articulate and he 22 is the highest authority on all things Nielsen 23 viewing with regard to the issues that are 24 present in this proceeding. 25 There is no witness that compares in</p>

<p>530</p> <p>1 experience or expertise with regards to Nielsen 2 data. 3 JUDGE BARNETT: And now he's retired. 4 What are you going to do? 5 MR. OLANIRAN: He's still with us. 6 (Laughter.) 7 MR. OLANIRAN: And he is -- he is 8 solidly behind the use of National People 9 Meter. And as he said, it is far -- it is the 10 most -- in the industry, it is generally known 11 as the most superior method of collecting data 12 on audience measurement. 13 So to the extent that there are 14 criticisms of the Nielsen data, whether it's 15 sufficient or insufficient, whether it leaves 16 some markets or doesn't include certain 17 markets, it is on our -- upon our discussion 18 with Mr. Nielsen -- I mean -- I keep calling 19 him Mr. Nielsen; he might as well be -- 20 Mr. Lindstrom, that he said in his testimony 21 that he recommended the NPM because he thought 22 it was the most superior way to accomplish what 23 we explained to him that we wanted to 24 accomplish with regard to Nielsen data. 25 So I just -- I would urge you to</p>	<p>532</p> <p>1 data. So it was, in fact -- for that reason 2 also, it was important -- it was more -- it 3 made more sense to use the metered data. 4 Now, with respect to using just '08 5 and '09 data, as Mr. Lindstrom testified, 6 Nielsen had been going through some changes. 7 They had evolved in terms of their data 8 collection methods. There was or there would 9 have been or there was a problem actually 10 accessing data going back to access data prior 11 to 2008, one, because they just weren't 12 supporting some of the databases that existed, 13 and they had data retention issues such that 14 while -- I think Mr. Lindstrom talked about the 15 fact that you would have had to write software 16 to create something that could reach far back 17 or could extract data from wherever it was 18 hidden, but it would have been -- it may not 19 have been impossible. For the time line that 20 we were facing with regard to responding to the 21 issues in the order, I think '08 and '09 were 22 as best as we could offer, which I think, given 23 the results, we would say that, in fact, it 24 should satisfy the concerns that you had, that 25 you articulated in the May 4th order.</p>
<p>531</p> <p>1 consider that, the depth of that expertise and 2 his experience, and -- when evaluating the 3 criticisms of Nielsen data, which it's not 4 perfect, but it's about as good as it gets for 5 the purposes of this proceeding. 6 So with regard to the use of the 2000 7 through 2003 data, at the time that the data 8 was extracted, the diaries actually had a -- 9 there was a full national sample for the 10 diaries at that time according to 11 Mr. Lindstrom's testimony. So that was way 12 better than using meters at least during that 13 -- during the period. I think at that point 14 there were 400,000 diaries versus 5,000 meters 15 at that point. So the meters had not really 16 come into play at that point. 17 Again, with respect to the National 18 People Meter, as I said, it is considered in 19 the industry the superior method for collecting 20 viewing data because they run 24 hours a day, 7 21 days a week, and 365 days a year. 22 And, in addition to that, by the 23 2008/2009 time frame, the number of meters in 24 all of the different markets had quadrupled and 25 there was a dissipation in the use of the diary</p>	<p>533</p> <p>1 So then Dr. Gray -- sort of using all 2 of the data available, including the additional 3 data, Dr. Gray performed multiple regression 4 analysis to establish a mathematical 5 relationship between distant viewing and local 6 rating, as well as with the other variables, 7 including the time of day of the program aired, 8 the number of distant subscribers, program 9 station affiliation, et cetera. 10 And he then, you know, used that 11 mathematical relationship -- those mathematical 12 relationships to then predict distant viewing 13 for every single program for every year for all 14 of the years in question. 15 JUDGE STRICKLER: How do you respond 16 to the criticism that he replaced actual 17 distant viewing with projected distant viewing 18 from his regression? Because he did have some 19 actual distant viewing, as you just pointed 20 out, but when he did his actual shares, he 21 substituted the actual distant viewing and 22 instead he used the projection. 23 How do you respond to the criticism 24 that that was inappropriate? 25 MR. OLANIRAN: Well, I think -- Your</p>

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1 Honor, I think that's a criticism that has been
2 raised not only in this proceeding and in other
3 proceedings, but that actually makes sense
4 because --

5 JUDGE STRICKLER: Not the criticism
6 but what he did, you mean?

7 MR. OLANIRAN: Right. Thank you.

8 JUDGE STRICKLER: I just want to make
9 sure the record is clear as well as my own
10 understanding.

11 MR. OLANIRAN: That approach actually
12 makes sense because the objective of the
13 regression is to project to the population. So
14 when you have a projection that covers
15 everybody and then you start supplanting -- you
16 start sort of divvying up between the data that
17 already existed versus -- the viewing that
18 already -- that he got, which is about
19 6 percent, I think, for those that don't count,
20 zero beyond those observations, versus the
21 methodological -- the methodology that predicts
22 for the entire population.

23 Actually I think it seems to make
24 sense because once you separate that data, I
25 think the regression then doesn't work.

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1 And you'd have to sort of distinguish
2 in that regression somehow between the existing
3 data versus the data that you've predicted,
4 because then you don't have a prediction. I
5 don't know if that makes --

6 JUDGE STRICKLER: That does answer the
7 question, but it leads me to another question.
8 Maybe you can refresh my recollection based on
9 the record.

10 Did Dr. Gray or anyone else do
11 anything in the nature of a sensitivity
12 analysis; that is to say, compare what the
13 actual distant viewing was, where he had
14 distant data, compared to what his projection
15 showed in those areas?

16 MR. OLANIRAN: I see where you're
17 going with it, but I don't think he did.

18 JUDGE STRICKLER: Did anyone else, as
19 you --

20 MR. OLANIRAN: I don't think anyone
21 else in this proceeding did such an analysis.
22 But, again, it goes to the same point, which is
23 you basically have -- what he's trying to do is
24 project distant viewing for the population.
25 And he has a very limited amount of data to do

1 that.

2 So unless you actually figure out a
3 way -- and I'm not a regression expert --
4 unless you actually figure out a way to
5 distinguish between actual data in the
6 regression process itself and predict projected
7 data, then I think it's -- it probably makes
8 sense the way that he did it. And so --

9 JUDGE STRICKLER: Thank you.

10 MR. OLANIRAN: But so -- I mean, going
11 back to the end result of Dr. Gray's effort was
12 to predict the -- what we're proposing as the
13 allocations for -- allocations in cable and
14 satellite for MPAA.

15 And just briefly looking at those
16 results for cable respectively for '04 through
17 '09, it's 99.6 percent and 99.6 percent,
18 99.34 percent, 99.44 percent, 99.28 percent,
19 and 99.44 percent.

20 And then with respect to satellite
21 funds, we are requesting 99.54, 99. -- from
22 2000 through 2009 respectively, 99.54 percent,
23 99.75 percent, 99.74 percent, 99.65 percent,
24 99.87 percent, 99.73 percent, 99.65 percent,
25 99.77 percent, and 99.78 percent, and

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1 99.57 percent. A lot of 99s.

2 Clearly, MPAA's -- the value, the
3 relative marketplace value of MPAA's
4 programming is far superior to IPG's. And
5 there are other statistics that essentially
6 bear -- that are also in the record that bear
7 this out with respect to the extremely high
8 marketplace value of MPAA-represented programs.

9 So if you look at the number of
10 compensable programs, for example, for cable
11 from '04 through '09, on average there were 36
12 times as many MPAA programs as IPG's on
13 stations retransmitted by CSOs.

14 For satellite from 2000 through '09,
15 on average, there were 48 times as many MPAA
16 programs. If you look at the number of claimed
17 retransmissions in cable on average MPAA
18 claimed program was retransmitted about 17
19 times by CSO while IPG's was retransmitted
20 about 12 times.

21 If you look at satellite, the
22 comparable numbers are 17 times versus 8 times.
23 If you look at the volume of programming, for
24 cable, MPAA's programs are between 97 and a
25 half percent on the low end to 98 .63 percent.

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1 And for satellite MPAA, again, was between
2 98.72 percent and 99.40 percent on the higher
3 end.

4 So the statistics establish without a
5 doubt that -- the overwhelming high marketplace
6 value of MPAA's programs relative to IPG's.

7 So the remaining question is whether
8 or not the data we now have in this record
9 actually satisfy the questions you raised,
10 which is, one, do we now have contemporaneous
11 data and, two, do we have persuasive, competent
12 evidence that says that we don't need
13 contemporaneous data, that Dr. Gray's initial
14 earlier analysis was actually reliable?

15 Understanding --

16 JUDGE BARNETT: I'm sorry.
17 Mr. Boydston or Mr. Galaz, could you mute your
18 phones? We're getting some interference.

19 MR. BOYDSTON: Yes. It was not coming
20 from my spot, but yes.

21 JUDGE BARNETT: Thank you very much.

22 MR. BOYDSTON: I'm sitting in a single
23 spot. Your Honor, I think that some of the
24 times it sounds like it was microphones being
25 bumped --

1 So we have those. And what the effect
2 of the additional data is to give us more
3 observations, which, I think, is at the heart
4 of your concern. So we now have additional
5 observations.

6 For cable, the number of cable
7 observations from the initial proceeding to
8 this one, I think in the initial proceeding it
9 was about 1.68 million observations. In this
10 proceeding, it is now up to 3.86 million
11 observations.

12 I don't have the precise number for
13 satellite, but Dr. Gray's testimony was that
14 satellite was in the same order of magnitude.
15 So we have more data. And because it's '08,
16 '09, and notwithstanding the fact that we
17 couldn't get the years prior, but we have a ton
18 more observations, which I think satisfies the
19 first prong that the order requires us to do.

20 Second, the second question is whether
21 or not there's persuasive, competent evidence
22 that the results were reliable in the first
23 place.

24 Interestingly, our first question
25 helps answer the second question because if you

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1 JUDGE BARNETT: Yes.

2 MR. BOYDSTON: -- in the courtroom
3 there.

4 JUDGE BARNETT: Well, no one is moving
5 in the courtroom either. So it must be sun
6 flares. Thank you. Go ahead, Mr. Olaniran.

7 MR. OLANIRAN: And what I was saying,
8 having gone through the record we now have, the
9 additional record we now have, so the remaining
10 question is whether, based on the May 4 order,
11 you have -- we now have contemporaneous -- some
12 contemporaneous evidence or whether that's
13 persuasive, competent evidence that suggests
14 that maybe we didn't need additional evidence,
15 additional data to start with.

16 JUDGE BARNETT: Except we wanted it.

17 MR. OLANIRAN: Yeah. Well, we
18 answered both questions, actually, with the
19 additional information that we now have in this
20 further proceeding.

21 First, as I said earlier, we now have
22 data -- we have four different sets of data for
23 cable, '08 and '09 custom analysis from
24 Nielsen; for satellite, '00 through '09 custom
25 analysis of distant viewing data.

1 look at Dr. Gray's results in the first
2 analysis versus the results of this analysis
3 with the additional data, they're actually
4 fairly comparable.

5 If I may, I have a demonstrative --
6 demonstrative exhibit that makes that point. I
7 miss the days of the ELMO.

8 JUDGE BARNETT: Have you shared those
9 demonstratives with Mr. Boydston?

10 MR. OLANIRAN: Yes. Well, that's
11 interesting. We were not aware that
12 Mr. Boydston would not be appearing. It's page
13 28 of our proposed findings.

14 JUDGE BARNETT: Okay.

15 MR. OLANIRAN: Which we filed on May
16 8th.

17 JUDGE BARNETT: So, Mr. Boydston, what
18 Mr. Olaniran is proposing as a demonstrative
19 exhibit is found on page 28 of MPAA's proposed
20 findings.

21 MR. OLANIRAN: That's correct, Your
22 Honor.

23 MR. BOYDSTON: Yes, thank you.

24 MR. OLANIRAN: May I approach, Your
25 Honor?

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1 JUDGE BARNETT: You may.

2 MR. OLANIRAN: So I was saying that
3 the additional data actually helps answer the
4 second question as to whether or not we needed
5 to perform -- we needed to add contemporaneous
6 data.

7 And if you recall, Dr. Gray's
8 testimony in the earlier proceeding was that he
9 was fairly confident that the results would not
10 -- would not be significantly affected. And if
11 you just simply looked at -- if you look at
12 2004 for cable, for example, you know, in the
13 initial proceeding we proposed 99.59 percent
14 share and the updated proceeding, we
15 proposed -- it came to 99.60.

16 And, you know -- and if you look at
17 the subsequent years, they're very similar. In
18 '05, cable, the initial proceeding was 99.55.
19 And the updated data -- and the augmented data
20 is 99.6. And so on and so forth.

21 If you look at satellite, it's fairly
22 similar numbers. For 2000 satellite,
23 Dr. Gray's proposed shares was 99.65 in the
24 initial proceeding. Here it's 99.54. In 2001
25 it's 99.77 in the initial versus 99.75 in the

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1 updated.

2 And if you go through all of the
3 years, you know, the numbers are substantially
4 similar. On average, the initial cable was
5 99.39; for the updated numbers, it's 99.45.
6 And then on satellite, very similar comparison.
7 The initial was 99.73 and the updated is 99.71.

8 So with regard -- so Dr. Gray had
9 testified initially that he didn't think the
10 results would change substantially. He thought
11 the results would be consistent, even with
12 additional data.

13 And we think this is sufficient
14 evidence that confirms his earlier testimony,
15 even though we appreciate your raising that
16 question, but, however, why we may have
17 disagreed that we didn't have to do it, but it
18 does help to have this on the record to make
19 sure that it's -- that Dr. Gray's work both
20 earlier and now are reliable.

21 JUDGE BARNETT: Mr. Olaniran, you will
22 acknowledge, will you not, that six
23 one-hundredths of a percent, while it seems
24 insignificant, when we're talking about the
25 number of zeros behind the dollar amounts that

1 are on deposit with the Copyright Office,
2 that's enough money to talk about, that that's
3 a serious amount of money; even though it seems
4 like an infinitesimal percentage, it translates
5 to quite a few dollars?

6 MR. OLANIRAN: I think that's a fair
7 point. But the general point, I think, from
8 our viewpoint, is that these are estimates.
9 And we're working on -- we used a sample, and
10 when there's a sample -- when there's samples
11 involved, it's not unusual to have variations.

12 And so -- but, again, as I said, we
13 appreciate the questions, and we went back and
14 dug deep and worked hard to satisfy your
15 questions. And I think we've been able to
16 satisfy the questions that you raised.

17 JUDGE STRICKLER: In looking at your
18 demonstrative that comes out of Dr. Gray's
19 written direct testimony, am I correct that the
20 difference between 100 percent and the figures
21 on the bottom -- let's take the average line
22 for a moment; that reflects the share that you
23 recommend goes to IPG, correct, out of this
24 category?

25 MR. OLANIRAN: That's correct, Your

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1 Honor.

2 JUDGE STRICKLER: So, initially, for
3 example, for cable, then it would
4 be .61 percent was -- you understood to be
5 attributable to IPG in terms of relative value?
6 And under the cable updated, it went down
7 to .55, just doing the simple math of 100 minus
8 those percentages.

9 MR. OLANIRAN: For --

10 JUDGE STRICKLER: For cable initial --

11 MR. OLANIRAN: Oh, I see.

12 JUDGE STRICKLER: -- 100 minus 99.39,
13 would be .61.

14 MR. OLANIRAN: Right.

15 JUDGE STRICKLER: So that would be the
16 relative value or relative share that you would
17 recommend for IPG, right?

18 MR. OLANIRAN: That's correct.

19 JUDGE STRICKLER: And that has now
20 gone down with the updated to .55.

21 MR. OLANIRAN: That's correct.

22 JUDGE STRICKLER: So it has gone down
23 about 10 percent, looking at it from IPG's
24 perspective.

25 MR. OLANIRAN: Yes.

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1 JUDGE STRICKLER: And, similarly, same
2 analysis, but looking at it from the satellite
3 side, it goes in the other direction. You have
4 -- it goes from .27 percent for satellite
5 initial to .29, so you actually show roughly a
6 10 percent increase in satellite share based on
7 your updated.

8 MR. OLANIRAN: That's correct.

9 JUDGE STRICKLER: Okay. Thanks.

10 MR. OLANIRAN: It attempts to increase
11 for IPG.

12 JUDGE STRICKLER: I meant for IPG if I
13 didn't say that.

14 MR. OLANIRAN: So... I just need
15 probably 30 seconds to make some remarks about
16 IPG's presentation or lack thereof.

17 IPG has no witness in this proceeding,
18 no testimony in this proceeding. There's no
19 information, no affirmative presentation of
20 evidence in this proceeding that you can rely
21 on to make an allocation to IPG.

22 To the extent IPG has criticized
23 either Dr. Gray's methodology or
24 Mr. Lindstrom's methodology or, frankly, any
25 other witness' methodology in this proceeding,

1 credible witnesses like Mr. Lindstrom and
2 Dr. Gray.

3 And I say all that to say that to the
4 extent IPG -- and it's the only information
5 that is presented, which is the proposed
6 findings, that IPG set forth in the proposed
7 findings, we urge the Judges to disregard IPG's
8 proposed findings.

9 And with that, I ask the Judges to
10 accept the results of the regression analysis
11 that I just discussed and allocate MPAA and IPG
12 shares as we have proposed. And, again, as
13 with Mr. -- as Mr. MacLean said, I want to
14 thank the Judges for the time and going through
15 this again, this further proceeding with us. I
16 know it has been challenging all the way
17 around, but I appreciate, as always, the
18 Judges' patience with our presentation. Thank
19 you very much.

20 JUDGE BARNETT: Thank you,
21 Mr. Olaniran. I believe you have now 25
22 minutes for rebuttal.

23 MR. OLANIRAN: Thank you.

24 JUDGE BARNETT: If needed.

25 Mr. Boydston and Mr. Galaz, we're

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1 such criticism cannot be supported by IPG's own
2 evidence.

3 I mean, I can stand at a podium and
4 fire questions at a witness and purport to
5 raise issues that are material, but that alone
6 is not sufficient to move the needle in terms
7 of making an allocation to IPG.

8 In addition to that, none of the
9 criticisms made by IPG has been quantified in
10 any way, shape, or form, to the extent that
11 those criticisms are even valid.

12 So even if you were to accept the
13 validity of some of the criticism, there has
14 been no quantification whatsoever in the record
15 that would allow you to adjust what MPAA's
16 proposal is with respect to the relative share
17 between MPAA and IPG. There's nothing.

18 The Judges' decision to allow
19 Mr. Boydston to cross-examine witnesses, even
20 though IPG on its own didn't have any witness,
21 was way too generous, at least in our view.
22 But we lived with it.

23 But Mr. Boydston's cross-examination
24 of any of the MPAA witnesses or SDC witnesses
25 cannot invalidate testimony of otherwise

1 going to take a brief recess while we all
2 stretch our legs and get pens that have ink in
3 them. We'll be at recess for 15 minutes.

4 (A recess was taken at 10:40 a.m.,
5 after which the hearing resumed at 11:01 a.m.)

6 JUDGE BARNETT: Please be seated.
7 Mr. Boydston, we're back on the
8 record.

9 MR. BOYDSTON: Thank you.

10 JUDGE BARNETT: Would you like to
11 reserve time for rebuttal?

12 MR. BOYDSTON: Yes, I'd like to
13 reserve ten minutes for rebuttal.

14 JUDGE BARNETT: All right. You may
15 proceed.

16 MR. BOYDSTON: Thank you.

17 CLOSING ARGUMENT BY COUNSEL FOR
18 INDEPENDENT PRODUCERS GROUP

19 MR. BOYDSTON: I'm going to start off
20 basically with sort of a philosophical
21 overview, if you will, and that is to address
22 the issue about the use of viewership data, you
23 know, in methodologies presented. Excuse me.

24 We're all aware of the ruling from the
25 2000 to 2003 proceeding in which the Judges

<p>550</p> <p>1 said viewership -- I believe the phrase was a 2 prime heuristic in this process. The Judges 3 also, though, qualified that by saying at the 4 same time, you know, the issues regarding 5 subscribership also need to be looked at. 6 The secondary question, then, becomes 7 if viewership is to be looked at, is there 8 sufficient data to do so? But let me -- but as 9 I said, I want to address the first issue first 10 and that is should we be looking at viewership 11 at all? 12 And as we all know, the prior 13 iterations of the CRB, the CRT and the CARP, 14 issued a number of decisions which I don't need 15 to go into detail. They have been detailed 16 throughout the briefs. But they went into a 17 lot of very detailed analysis about the use of 18 viewership and concluded that it was being used 19 -- or, rather, that focusing on viewership 20 focused on the wrong thing for this process, 21 because the decision of a cable system operator 22 or a satellite system operator to pay this 23 license fee for a particular station to be 24 retransmitted, it really comes down to that 25 CSO's decision about, you know, what are they</p>	<p>552</p> <p>1 just never been a good explanation as to why 2 there should be any distinction as to the 3 appropriateness of a viewership approach in 4 Phase II versus Phase I. And the best as I can 5 discern from what has been written on that and 6 what little explanation there has been, and 7 just from my own thoughts on it, is that, okay, 8 perhaps one can say that in Phase I, when 9 you're looking at Phase I decision situation, 10 you're focusing on a CSO choosing between 11 different categories, sports, general 12 programming, public broadcasting, Devotional 13 programming, et cetera. 14 And in that process, he or she is 15 choosing between general categories -- 16 generally defined categories of programming in 17 such a way that you can say, okay, I, the CSO, 18 I really need more sports and the sports I 19 value more right now in this decision I'm 20 making than I do religious programming and, 21 therefore, at Phase I, we'll have, you know, an 22 allocations that give a lot more to sports and 23 a lot less to Devotional programming relative 24 to each other. 25 But then, when you turn to Phase II,</p>
<p>551</p> <p>1 doing, why are they paying this? 2 And the analysis that was done 3 previously and that has been done since is that 4 the CSOs and SSOs really don't look at ratings, 5 they're really not that interested in ratings 6 when they do that; they're interested in how 7 the relative -- the programming at issue fits 8 within their potpourri of programming, if you 9 will. And in that regard ratings just aren't a 10 big consideration. And that's what has been 11 testified to by prior witnesses. 12 And at the same time, it seems that 13 the parties and the Judges have adopted a 14 position on that or observed, rather, that, 15 well, okay, in Phase I, that's one thing, but 16 in Phase II, it's another thing. In other 17 words, the prior decisions that I'm referring 18 to, many of them are Phase I decisions, and, 19 you know, that precedent sits out there. And 20 yet it has not been adopted in recent 21 proceedings with the rationale being, well, 22 that was Phase I and this is Phase II. 23 And I've said this orally in different 24 proceedings and we've said it in our briefs 25 before, but I've never -- I feel like there has</p>	<p>553</p> <p>1 that same analysis doesn't apply because 2 theoretically -- or the Phase I categories are 3 homogenous. And so the cable system operator 4 or satellite system operator when they're 5 looking at their decision and they're saying, 6 okay, within the Devotional category, what 7 programming do I want to choose? Well, the 8 idea being since it's all homogenous anyway, 9 they're not going to distinguish between 10 different aspects of the programming. They're 11 going to say what's the most popular program? 12 And if their decision on which of a 13 set of Devotional programs they're going to 14 choose is ultimately going to be based on which 15 is most popular, one would look to ratings to 16 say which is most popular. 17 The problem with that is that although 18 the Phase I categories are homogenous to a 19 degree, it's only to a degree, and actually 20 when you get down to brass tacks, they're not 21 all that homogenous, certainly not homogenous 22 enough to make the assumption that when a CSO 23 makes its choice, they're going to base it 24 upon, you know, the popularity of the different 25 programs within a category.</p>

<p>554</p> <p>1 And there's a couple ways to 2 illustrate this, and I will give you the 3 following. Let's assume that a CSO is trying 4 to make a decision between Devotional 5 programming. One would say, okay, if 6 viewership is the primary heuristic, he's going 7 to look and say which of these various programs 8 that are on different stations I'm going to pay 9 a license on, where is the most popular 10 program, which station has the most popular 11 Devotional program? 12 Well, possibly the CSO may do that, 13 but from all the evidence that has been 14 presented in these proceedings going down 15 through the years, it's clear -- and it gets 16 clearer that at the same time, if the choice 17 was between, say, a Muslim religious program 18 and a Baptist religious program, the decision 19 of the CSO is not necessarily going to be based 20 on popularity in terms of viewership but, 21 rather, what fits and fulfills the niche 22 marketing and niche programming needs of that 23 CSO. 24 JUDGE STRICKLER: Mr. Boydston -- 25 MR. BOYDSTON: So in that analogy, the</p>	<p>556</p> <p>1 criteria as we do in Phase I? Can you identify 2 a witness and can you point us to any of the 3 evidence? 4 MR. BOYDSTON: Well, I mean, the -- in 5 this proceeding, obviously as you know, the 6 prior testimony that we asked to have submitted 7 was rejected, and so that's the elephant in the 8 room that's not there, if you will. 9 At the same time, in her testimony, 10 Toby Berlin acknowledged the -- these 11 principles as well, and she had a very specific 12 point where she said once a program is adopted, 13 usually it doesn't get dropped because there's 14 always some constituency for certain 15 programming even if it's not -- doesn't have 16 very high ratings or it's not very popular. 17 And in so doing, she -- and she made 18 other comments as well that were consistent 19 with that. And in so doing, I think it's fair 20 to say that she, you know, acknowledged, what 21 I'm saying here now, which is that a CSO, when 22 it's looking at programming, a lot of times is 23 looking at things other than ratings. They're 24 looking at how it fits into their niche 25 programming or -- excuse me -- does it fulfill</p>
<p>555</p> <p>1 Baptist program may have much higher ratings 2 than the Muslim religious programming. 3 JUDGE STRICKLER: Mr. Boydston -- 4 MR. BOYDSTON: And that might look -- 5 JUDGE STRICKLER: -- this is Judge 6 Strickler. Good morning. How are you? 7 MR. BOYDSTON: Good morning. Very 8 good. Thank you. 9 JUDGE STRICKLER: As I understand what 10 you're arguing, you're basically saying that we 11 need to import, if you will, some of the logic 12 and rationale that we have in Phase I 13 determinations, what we call now allocation 14 determinations, into the Phase II or 15 distribution proceedings. And you've laid out 16 an argument and you've pointed generically to 17 evidence that you've described as evidence in 18 the proceedings over the years. 19 Can you identify for us any evidence 20 by any witness in this proceeding that would 21 support your argument that what CSOs do in 22 terms of looking towards value in individual -- 23 with regard to individual programs, which is 24 what we're looking at here in the distribution 25 proceeding, to do that we should apply the same</p>	<p>557</p> <p>1 a particular niche they need to fulfill in 2 their programming? 3 And in that regard, just to complete 4 my analogy very briefly, if you're a CSO and 5 you have a community, a Muslim community, 6 that's in your area and you feel that they 7 would probably -- you would attract subscribers 8 if you had Muslim religious programming, you 9 then might be more interested in paying for 10 retransmission of a station that includes 11 Muslim programming even though it gets a much 12 lower rating than other religious programming 13 in the same category, the same Devotional 14 category. 15 And so that, I think, is consistent 16 with what Ms. Berlin was saying in terms of the 17 fact that, you know, sometimes even when you 18 have things that are not -- that may be -- you 19 know, that don't have very big ratings or very 20 big audience, that's not a reason necessarily 21 to not, you know, go ahead and pay the license 22 to get that programming for the very good 23 reason that it may fulfill programming that you 24 don't have if you're that CSO. 25 I mean, the other thing too is that --</p>

<p style="text-align: right;">558</p> <p>1 and I would say -- I don't know that, you 2 know, you characterize it as criteria in the 3 Phase I proceeding. I think that's an accurate 4 way to put it. 5 But at the same time, there's no 6 reason why it should only -- I guess my whole 7 point is there's no reason why it should only 8 be a criteria or consideration in Phase I. 9 There's just really nothing about it logically 10 that I think says you should -- that that 11 analysis should be restricted to only 12 situations in which you're judging category by 13 category as opposed to judging programs and 14 transmissions within a category. 15 You know, another analogy that could 16 be made is, you know, in general programming, 17 you -- the Program Suppliers category is, 18 frankly, not very homogenous as is pointed out 19 and is dramatized by Mr. -- Dr. Gray's 20 analysis, in which he actually in this round, 21 in this, in our present proceedings, he 22 actually adopts as part of his methodology a 23 metric in which he judges different programs 24 differently based on different -- them falling 25 into different categories within the Program</p>	<p style="text-align: right;">560</p> <p>1 made of the MPAA methodology and the SDC 2 methodology in the first round of this 3 proceedings were essentially that there was 4 insufficient -- or the Judges were 5 uncomfortable with the level of data that was 6 supporting the viewership analyses in both 7 those methodologies. 8 And what we've seen here in this 9 proceeding is that there's really not much more 10 that's being added. In fact, there's very, 11 very little in terms of data that has been 12 added to either of these methodologies. 13 They're essentially the same -- you know, 14 almost the exact same data sets that occurred 15 before. 16 And both the MPAA and the SDC state 17 that, gee, you know, we did our best to find 18 more data and we couldn't and we found what we 19 found and there's nothing else out there and 20 we're sorry, and just because we don't have 21 that additional data, we shouldn't be -- you 22 know, we shouldn't go throwing out our 23 methodology. 24 You know, those, I think, are -- I 25 hear what they're saying. They're practical</p>
<p style="text-align: right;">559</p> <p>1 Suppliers category, which very clearly shows up 2 the lack of homo- -- general lack of 3 homogeneity in the Program Suppliers category, 4 such that, you know, it makes sense to focus on 5 a CSO's decision-making outside of viewership 6 when looking at his choice even within a 7 category, i.e., in a Phase II scenario, as 8 opposed to a Phase I scenario. 9 And so I think that logically flows. 10 I think that it is supported by that portion of 11 Ms. Berlin's testimony, and, you know, I 12 realize that rulings have been made, but we all 13 of us were present a couple years ago when 14 Mr. Egan testified and said that, as a CSO, he 15 never looked at ratings and he looked at those 16 other factors about what fits where. 17 But, as I say, that's consistent -- to 18 answer your question, I think that's consistent 19 with Ms. Berlin's testimony. 20 Now moving to the second large 21 picture, big picture point, and that is should 22 we view -- you know, let's look at the quality, 23 if you will, of using -- of the analysis based 24 upon viewership. 25 And the criticisms that the Judges</p>	<p style="text-align: right;">561</p> <p>1 realities to a degree, although I say to a 2 degree because it was stated by, you know, 3 Mr. Lindstrom and different witnesses: Well, 4 yeah, it's possible there could have been more, 5 but we couldn't get it within the time frame, 6 et cetera, et cetera. 7 But the bottom line is if there's not 8 enough data, there's not enough data. And that 9 -- and as little as anyone wants to prolong 10 this process, if that is the case, then these 11 methodologies must be rejected and we need to 12 go further down the road. 13 And as much as everyone may not want 14 to do that, you know, the Judges are obligated 15 to, quote, unquote, stick to their guns, stick 16 to the law, stick to the rules, and order that 17 if that is what is required. 18 You know, that sometimes hard choices 19 or hard rulings like that have to be made. 20 Frankly, the ruling that excluded all the past 21 testimony that IPG intended on relying on was a 22 pretty bitter pill to swallow, but it was made 23 and that's what must be lived with. And that's 24 what must be -- how we must move forward. 25 Similarly here, I think at the end of</p>

<p>562</p> <p>1 the day, the bottom line is there's not enough 2 data here to support these viewership-based 3 methodologies and so we need to go back to the 4 drawing board.</p> <p>5 Now, I would point out that that 6 problem, i.e., insufficient data, is not a 7 problem when you look at certain other factors. 8 For instance, you know, if you look to 9 methodologies that have been proposed in the 10 past by IPG, but also methodologies used by 11 foreign collectives, such as the Canadian 12 collective, the Australian collective, et 13 cetera, there are metrics that are used in 14 those different methodologies that have been 15 offered in the past and are offered overseas, 16 that suffer from no lack of data, specifically, 17 with regard to things like subscribership, 18 volume of programming, and time of day.</p> <p>19 Those are all things where all the 20 data is available from Tribune, from CDC, from 21 the various sources available. And so it's not 22 even a question of is there enough data to make 23 those kinds of analyses and metrics; there is 24 all the data you need to make those analyses. 25 And so in stark contrast to a</p>	<p>564</p> <p>1 Or another possibility which I 2 mentioned in the past and I'll mention again, 3 you know, it has always struck me that a third 4 path here is for the Judges to retain a special 5 master to look at different options and do an 6 independent study, if you will, on a possible 7 methodology from scratch.</p> <p>8 You know, we've gone years and years 9 for the parties trying to do this with relative 10 lack of success, and I suggest that's a third 11 possibility that I think should be considered. 12 I'll move now specifically to issues 13 regarding the two individual methodologies. 14 And I'll start out with the SDC.</p> <p>15 As the SDC acknowledged, you know, 16 this is essentially the same methodology that 17 they've offered before. They're attempting to 18 buttress it with some additional data from the 19 HHHV -- that's actually the MPAA's HHVH data 20 from the 2000-2003 time period. There's no 21 additional data for the years 2004-2009.</p> <p>22 Mr. Sanders said, you know, we tried 23 to get more data and I'm not sure why we 24 couldn't. And, you know, that is what it is, 25 as they say.</p>
<p>563</p> <p>1 viewership-based methodology like has been -- 2 is being presented here, where we have major 3 gaps of data, major issues with the data when 4 you get into the zero viewing problem and 5 things like that, those other types of metrics 6 have no data problems.</p> <p>7 Now, one may have other criticisms of 8 them, but you can't criticize them for a lack 9 of data because we can get all that stuff from 10 Tribune and CDC, et cetera, and know exactly 11 what program was broadcast or -- excuse me -- 12 retransmitted when and how many subscribers 13 could potentially lay eyes on it, and at what 14 time of day it was put on. Was it put on in 15 prime time or was it put on in the middle of 16 the night? Those are all things that can be 17 determined with pretty much 100 percent 18 certainty.</p> <p>19 And I think that that is something 20 that should be considered by you the Judges 21 when you decide whether or not you're going to 22 go forward and approve a distribution based on 23 these methodologies that are presented to you 24 with their problems, or should we be going back 25 to the drawing board?</p>	<p>565</p> <p>1 With regard to the use of that 2 additional data, I point out Dr. Erdem relied 3 on it, although he has no foundational 4 standpoint from which to do so. I would argue 5 that he has insufficient familiarity with it to 6 begin with.</p> <p>7 When it comes down to, you know, what 8 the SDC actually do, they do two things. First 9 of all, they go through this analysis in which 10 they attempt to say, well, it's okay -- you 11 know, they try to make the linkage between 12 local ratings and distant viewership ratings, 13 and they go through a lot of effort and try and 14 say this is a correlation that is -- you know, 15 we can live with, it's a correlation that is, 16 you know, supported by the numbers.</p> <p>17 But the bottom line is that there's 18 very, very difficult problems with that. The 19 two major data sets that are used are -- one is 20 a national average local rating measure and 21 then -- well, actually, I'm jumping ahead. 22 That's with regard to the actual attribution of 23 value itself.</p> <p>24 With regard to the correlation, that's 25 essentially the same thing that has been done</p>

<p style="text-align: right;">566</p> <p>1 before, although not very successfully, i.e., 2 the MPAA attempted to make this same kind of 3 correlation analysis in the first round of this 4 proceeding, and it was rejected by the Judges. 5 And, you know -- and in addition to 6 that, the MPAA actually had more information 7 and it was based on a greater amount of data, 8 and the Judges rejected that. And so there's 9 -- I think, by the same token here, you know, 10 this alleged correlation between local ratings 11 and distant viewership, it just isn't -- it 12 isn't there. 13 And that's the entire predicate for 14 Mr. Erdem's methodology. Well, I say entire 15 predicate. The -- excuse me -- the SDC now 16 say: Well, that's not just it. We're also 17 relying heavily on Mr. -- or Ms. Berlin, 18 rather, and -- excuse me -- Mr. Sanders in 19 terms of their opinions on this subject. 20 With regard to Mr. Sanders, let's 21 remember he has never been engaged by a CSO on 22 what signals to import. And the SDC 23 acknowledged this. He is only an expert on 24 media valuation in a very general sense and 25 has, you know, no expertise as to what</p>	<p style="text-align: right;">568</p> <p>1 ratings like programs for kids, programs in 2 particular, foreign languages, things like 3 that -- that brought value to DirecTV. 4 That, Judge Strickler, is part of the 5 testimony that I'm referring to that supports 6 my point that it makes sense to look at that 7 sort of a factor when making these decisions. 8 Excuse me. Her expertise by her own 9 testimony was with local retransmissions, not 10 distance retransmissions. And there's -- 11 that's a very different world. And she never 12 gives any explanation why her understanding of 13 local and her familiarity with local 14 retransmissions would translate into knowledge 15 of what a CSO or SSO would be interested in 16 terms of distant retransmissions. 17 When she said that, oh, yeah, we 18 looked at ratings, it was for a -- it was for 19 stations, not particular programs. But, in 20 addition to that, the fact is that the carry 21 one, carry all law means that when a cable 22 system operator has to carry -- wants to carry 23 one or retransmit one local station, it has to 24 retransmit all of them. And so, as a result, 25 they're not even really making a station</p>
<p style="text-align: right;">567</p> <p>1 motivates a CSO to choose one of these -- one 2 retransmission over another. And so one has to 3 really put an asterisk next to the quality of 4 his opinion that there's some sort of 5 connection here. 6 In addition to that, he acknowledged 7 that subscribership is, even though distant 8 viewership is down. And yet, at the same time, 9 he insists that there's a relationship between 10 distance viewing and subscribership, which is 11 just contradictory to the obvious point that if 12 subscribership is up despite viewing going 13 down, how can there be a positive correlation 14 between the two? 15 With regard to Ms. Berlin, the fact of 16 the matter is that her testimony is 17 contradictory in many respects. She was at -- 18 where she worked that has -- well, where she 19 works is DirecTV. DirecTV is not a cable 20 system operator or a satellite system operator 21 per se. It is a -- well, it is, but it is 22 consisted almost entirely of cable networks, 23 not retransmissions, retransmitted stations. 24 Her success, she says, came from 25 getting small niche programming with low</p>	<p style="text-align: right;">569</p> <p>1 -by-station decision over -- in that context 2 because if they choose one, they've got to 3 choose them all. 4 Back to my point that DirecTV was 5 primarily cable networks, again, they only 6 distantly retransmitted 9 to 11 stations during 7 the period of 1999 to 2003. In contrast, over 8 2000 local retransmissions. And between the 9 years 2004 to 2009, they only retransmitted 34 10 to 50 distant retransmissions. 11 So her expertise, to the extent she 12 has it, is really restricted to local 13 retransmissions, not distant retransmissions. 14 And so it is, you know, frankly 15 implausible that Toby Berlin and DirecTV 16 actually relied upon ratings in making 17 decisions as to which distant retransmissions 18 they were going to pay for and which they were 19 not. 20 Getting back to the issue of the -- 21 well, that, anyway is -- getting back to the 22 issue away from the individual testimony of Ms. 23 Sanders -- or Mr. Sanders and Ms. Berlin on the 24 correlation, again, just to reinforce the 25 point, the MPAA when it tried this, it was</p>

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1 dealing with many, many more, you know, many,
2 many more programs and data points, if you
3 will, than the -- the SDC is trying to do so
4 here. Mr. Erdem indicated that he had 60 data
5 points to base this upon, which is essentially
6 something like 12 programs per year.

7 When I asked him, he said -- what
8 would be too little? He said, well, I think
9 that ten is enough. They're making a claim if
10 132 separate programs. Now, they made a
11 qualification in their reply saying, well, it's
12 not actually 132 programs; some are, you know,
13 duplicates and things like that. Still, it's a
14 large number of programs and over ten years.
15 And if there were -- let's say there's not 132.
16 Let's say there is 100. Even over ten years,
17 that's a thousand potential data points.

18 And yet, they're basing this
19 correlation on just 60 out of -- you know, out
20 of that sort of a universe. And as a result,
21 it really seems to be stretching the rubber
22 band too far.

23 In addition, this correlation is not
24 based on broadcasts, as they acknowledge. It's
25 based upon annual averages of broadcasts and --

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1 which is just a completely different animal.
2 And, therefore, there again, we're stretching
3 the rubber band beyond its breaking point in
4 that regard.

5 The comparisons too are only for 1999
6 to 2003. Those are the only years in which
7 distant retransmission data has been obtained
8 in these proceedings from the MPAA. And that's
9 the limit to their ability to back this up with
10 data. The --

11 Excuse me, I need to have a drink of
12 water.

13 Now, as has been acknowledged by the
14 SDC, their problem with this is that they
15 acknowledge they -- in their analysis, they
16 missed a number of Devotional programs. A
17 number of Devotional programs do not come up in
18 this data. And they say: Well, that's just
19 tough, and that means there's no value to them
20 and there's no proof that there is any value to
21 them.

22 However, these are programs which we
23 know were retransmitted and, therefore, we know
24 that under the law, they should be entitled to
25 some kind of a -- they should be entitled to

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1 some share of these moneys.

2 The fact that they are not identified
3 in this data is a problem with the data, not
4 with the programs themselves. The SDC says:
5 Well, a lot of them are specials and things
6 like that, and we don't know when they're going
7 to be programmed, and so if you were going to
8 go and try and sell that to somebody, why would
9 they be interested in buying it?

10 That is a criticism applicable perhaps
11 to the actual market, but it is not an issue
12 here in the hypothetical market in which we are
13 operating. In the hypothetical market in which
14 we're operating, if a program is retransmitted,
15 by law it is entitled to recompense for that
16 retransmission.

17 And it is not -- it is not an issue as
18 to whether or not it was a special or if anyone
19 knew ahead of time what kind of ratings it
20 would get or how popular it would be, which is
21 always the case anyway, because ratings are
22 always after-the-fact information, which is,
23 again, one of the better reasons why it's
24 questionable as to whether or not it's
25 appropriate to look at those sorts of things in

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1 this context.

2 Mr. Erdem tries to address this issue
3 of the missing programs with a volume analysis.
4 You know, that volume analysis frankly, you
5 know, is using a metric that has been
6 criticized by the Judges in the past, for one
7 thing, and the methodology, the reliability has
8 been questioned by the Judges, so it's hard to
9 know if that really should be done in the first
10 place.

11 The other thing that the SDC analysis
12 or methodology does is it attempts to make a
13 valuation of satellite retransmissions based
14 upon cable data. Now, this is despite the fact
15 that the Mr. Lindstrom has testified that, in
16 general, mixing data sets is a bad idea. But
17 he testified to that in the context of using
18 different data -- different Nielsen -- Nielsen
19 diaries versus meters and other things like
20 that within cable or within satellite.

21 It's a whole other level of a stretch
22 to simply say, well, we're just going to guess
23 that whatever the numbers say in cable inform
24 us as to what goes on in satellite, despite the
25 fact that programming line-ups in the two are

<p style="text-align: right;">574</p> <p>1 completely different. The channels or 2 stations, if you will, in the two are 3 completely different. And, therefore, it seems 4 like just an inappropriate, you know, way to 5 attack the problem.</p> <p>6 Let's talk a little bit about zero 7 viewing, which applies in both circumstances to 8 both methodologies. Again, the prior decisions 9 have stated that the zero viewing problems are 10 significant. And, granted that was in a phase 11 -- well, mostly in the Phase I proceedings, not 12 entirely, but the point being that when we have 13 that data problem with zero viewing, it is not 14 something we can sweep under the rug.</p> <p>15 That is what both the SDC and the MPAA 16 do repeatedly. And for Erdem, he says that, 17 you know, he's -- well, in both situations -- 18 let me back up.</p> <p>19 The edict from prior decisions was 20 that if you're going to use ratings and 21 viewership, you need to try to reduce the 22 incidence of zero viewing in the data and you 23 need to give an explanation as to why there is 24 so much zero viewing in the data. Neither the 25 SDC or the MPAA have done so.</p>	<p style="text-align: right;">576</p> <p>1 replace the actual with something theoretical 2 just doesn't seem like a good idea on any -- in 3 any circumstance.</p> <p>4 JUDGE STRICKLER: Mr. Boydston, if you 5 recall my follow-up question was whether there 6 was anything that was in the nature of some 7 sort of a comparison that was undertaken by 8 Dr. Gray or anyone else to identify whether or 9 not the substitution of the projected data for 10 the actual data showed consistency or 11 inconsistency as between the projected and the 12 actual data.</p> <p>13 Are you aware of anything in the 14 record that would shed some light on that?</p> <p>15 MR. BOYDSTON: No, I am not aware of 16 anything in the record that would shed some 17 light on that.</p> <p>18 JUDGE STRICKLER: Thank you.</p> <p>19 MR. BOYDSTON: So it remains an open 20 question, obviously.</p> <p>21 Just give me one moment.</p> <p>22 At this point, I want to turn more 23 exclusively to the MPAA. So let me change 24 gears and hats here for just a minute.</p> <p>25 Now, again, the -- in terms of --</p>
<p style="text-align: right;">575</p> <p>1 They have tried to, as I say, sweep 2 the issue under the rug by basically saying, 3 well, we're going to do our best to impute 4 numbers into -- well, this is primarily MPAA -- 5 impute numbers into zero viewing circumstances 6 and then use all that information, again, to 7 make averages and predictive analyses of what 8 likely the level of viewership was in 9 situations where there was zero viewing.</p> <p>10 And, Judge Strickler, you had a 11 question to this earlier, which is right on 12 point, which is does it really make sense to 13 replace actual data with made-up data or data 14 that comes from a regression analysis? And I 15 think, you know, that the logical answer is of 16 course it doesn't.</p> <p>17 And it wasn't really -- you didn't 18 really get much of an answer as to why that's 19 okay other than, well, you know, this is the 20 methodology and it makes sense -- I think it 21 makes sense within the methodology. It's 22 really hard, I think, to accept that it makes 23 sense to replace real numbers with numbers 24 derived from an analytical process, which may 25 have its merits or -- and demerits, but to</p>	<p style="text-align: right;">577</p> <p>1 let's start with focusing on data and "what's 2 new at this juncture." And the only thing 3 that's new at this juncture is the addition of 4 the 2008-2009 National People Meter distant 5 viewing data. That's the only thing that has 6 been added by Dr. Gray and the MPAA to their 7 analysis.</p> <p>8 First, right off the bat, let's recall 9 that Mr. Lindstrom himself testified that -- in 10 past proceedings and this one as well, that 11 it's not a good idea and, in fact, one should 12 never mix these kinds of data, specifically 13 these different kinds of Nielsen data.</p> <p>14 And yet, that's exactly what ends up 15 being done in this process. And that's -- and 16 so the only thing that we're really adding -- 17 that the MPAA is really adding to the equation 18 in this round, as opposed to the last round, is 19 that exact conduct, to take this National 20 People Meter distant viewing data, add it to 21 their analysis, and mix it with data from 22 Nielsen that is of a completely different type.</p> <p>23 Now, the other thing is that it's only 24 for 2008-2009. That means that there is no 25 data added for 2004 to 2007. And so we're</p>

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1 really looking at here again basically a very,
2 very, very narrow set of data.

3 And the result, then, that comes out
4 of that is that IPG is entitled to just
5 0.46 percent -- well, of the 2000 satellite
6 focus -- let me start all over again.

7 Focusing on the 2000 satellite pool,
8 the MPAA analysis concludes that IPG is
9 entitled to just 0.46 percent of the 2000
10 satellite pool. As a way of illustration to
11 show how disparate and out of whack that is
12 with -- if you look at that same year, 2000
13 satellite, and you focus on the other metrics
14 that Gray has looked at, including volume, et
15 cetera, IPG is entitled to anywhere from
16 3.37 percent to 1.3 percent for that 2000
17 satellite pool.

18 So there is clearly -- there's clearly
19 something off in that analysis. In addition to
20 that, from just a very generalized standpoint,
21 when IPG -- the first proceeding that IPG
22 participated in, in, I believe -- it was in the
23 '90s, I think it was '98, '99, but I'm not
24 positive. I'll get to that later on in my
25 notes. But it's relevant to this point here so

1 is relying on essentially a sliver of data, and
2 part of that reason it's only a sliver of data
3 is because of the incidents of zero viewing.

4 As we calculated it, it's basically
5 about 6 percent of the distant retransmitted
6 broadcasts from 2000 to 2003, and 6 percent of
7 the retransmitted broadcasts from 2008 and 2009
8 have a positive measurement for distant
9 viewership, i.e., over 90 percent instances of
10 zero viewing because we're focusing on only the
11 sweeps periods to begin with, which are 16
12 weeks, and then for the other 36 weeks, there's
13 no measurements whatsoever. And so when you
14 make that decision, we're talking about a very,
15 very limited amount of information here.

16 Getting into some of the details of
17 Gray's analysis, let's remember this, that he's
18 attempting to predict distant viewership for
19 broadcasts on 122 cable retransmitted stations
20 during 2004. However, he only had local
21 ratings data from 56 markets. And he did not
22 say what number of 122 sampled retransmitted
23 stations were covered by such markets. And
24 those 56 markets are not a random sample.
25 They're the 56 largest in the country.

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1 I want to bring it up.

2 In that prior proceeding, IPG was
3 awarded -- I think it was about 0.22 percent.
4 And that was based on just ten programs for one
5 client, Litton Syndications. Here, we're
6 looking at IPG with over 80 and, in some cases,
7 over 100 different producers for each of the
8 years in question.

9 And what is the conclusion from that?
10 Despite that huge increase in volume of
11 programming that IPG represents, it's only a
12 little more than double. It simply doesn't
13 make any sense, and it points up the
14 weaknesses, I think, in this methodology and
15 this approach.

16 And, therefore, it -- you know, I
17 think -- where does that come from? Well,
18 again, I think it comes from, in part, from
19 focusing on viewership, which is a mistake,
20 and, Number 2, the fact that viewership, we
21 just don't have sufficient data to make a
22 reliable viewership calculation of these
23 various amounts.

24 And the other problem, again, we go
25 back to the problem that the Gray methodology

1 And so what you have is not a
2 stratified sample of stations that are being
3 retransmitted but a non-random sample of just
4 the 56 biggest markets, which is certainly --
5 you know, one, it's easy to say is can that
6 really be predictive of viewing in locales
7 where most of the distant retransmission goes
8 on, which are largely rural areas as opposed to
9 the 56 largest U.S. markets? It's a -- it's a
10 problem. It's a very big problem.

11 Then we get into the other details
12 about Gray's analysis, some of the other
13 weaknesses. He imputed the retransmitted
14 broadcasts with the average local ratings,
15 programs of the same program type according to
16 Tribune data and that are being broadcast
17 during one of six to eight part-time slots.

18 There's no evidence what number of
19 positive major distant measurements for
20 2000-2003 and 2008-2009, i.e., the non-zero
21 viewing measurements, the positive
22 measurements, were used to define the
23 mathematical relationships for those metrics.
24 There's no evidence whether such measurements
25 were proportionate between broadcasts for IPG

<p style="text-align: right;">582</p> <p>1 programming and MPAA programming.</p> <p>2 There's no evidence demonstrating what</p> <p>3 number of positive measures, distant</p> <p>4 measurements for 2000-2003 and 2008-2009 were</p> <p>5 used to define mathematical relationships with</p> <p>6 non-imputed local ratings measurements. Nor</p> <p>7 whether such measurements were proportionate</p> <p>8 between broadcasts for IPG programming and MPAA</p> <p>9 programming.</p> <p>10 There's no evidence demonstrating what</p> <p>11 percentage of the positive measure of distant</p> <p>12 broadcasts for the years in question were of</p> <p>13 the aggregate, i.e., the positive measured and</p> <p>14 unmeasured distant broadcasts of cable and</p> <p>15 satellite for 2000-2009. Nor is there evidence</p> <p>16 whether such percentages, again, were</p> <p>17 proportionate between broadcasts for IPG</p> <p>18 programming and MPAA programming.</p> <p>19 Despite this, Gray then predicts that</p> <p>20 distant viewerships to all distant</p> <p>21 retransmitted broadcasts appeared in his</p> <p>22 sampled stations.</p> <p>23 Consequently, when a distant</p> <p>24 viewership is an imputed local rating, then the</p> <p>25 same indicia that resulted in the imputed</p>	<p style="text-align: right;">584</p> <p>1 ratings and distant viewership data reflected</p> <p>2 serial viewing, Gray still imputes this</p> <p>3 positive figure to both of them.</p> <p>4 The regressions that he does this with</p> <p>5 are calculations of averages of positive</p> <p>6 numbers. As a result, after imputing his</p> <p>7 rejections of distant viewing, which are, he</p> <p>8 says, less than 1 percent of his entire -- less</p> <p>9 than 1 percent, he is imputing his prediction</p> <p>10 of distant viewing for 100 percent of the</p> <p>11 retransmitted broadcasts. He's imputing a</p> <p>12 positive viewership figure to no less than the</p> <p>13 94 percent of occasions on which there is no</p> <p>14 distant viewership. Again, the problem with</p> <p>15 this is not really explained, it's not solved,</p> <p>16 and it remains one of the weaknesses in using</p> <p>17 this kind of data. Excuse me.</p> <p>18 And, again, another observation about</p> <p>19 this regression analysis. If all of the</p> <p>20 criteria utilized to impute this local rating</p> <p>21 is based upon -- it's based upon averages of</p> <p>22 positive numbers, and then it's factored</p> <p>23 against other positive numbers in order to</p> <p>24 predict distant viewership. It's a foregone</p> <p>25 conclusion that there appear to be a positive</p>
<p style="text-align: right;">583</p> <p>1 rating are again used to predict that distant</p> <p>2 viewership and -- constituting essentially a</p> <p>3 double factoring of the same indicia as part of</p> <p>4 the prediction of distant viewership.</p> <p>5 Using 2000 satellite as an example,</p> <p>6 Gray asserts a correlation between the local</p> <p>7 ratings and distant viewership for</p> <p>8 IPG-represented programming but based on</p> <p>9 approximately only, again, 6 percent of the</p> <p>10 actual retransmitted broadcasts that recorded a</p> <p>11 positive measurement, then reduced by an</p> <p>12 unknown percentage of broadcasts for which Gray</p> <p>13 didn't have Nielsen local ratings because the</p> <p>14 broadcasts appeared on stations not appearing</p> <p>15 in the top 56 markets.</p> <p>16 Then he asserts a correlation for his</p> <p>17 volume measurement that reflects -- strike</p> <p>18 that. Strike that. It was -- that's argument.</p> <p>19 I already went over that and that's an</p> <p>20 incorrect point here.</p> <p>21 The bottom line is that what Gray ends</p> <p>22 up doing is he supplants -- as we said before</p> <p>23 and they acknowledge, he supplants the Nielsen</p> <p>24 distant viewership actually measured with his</p> <p>25 prediction of viewership. And where both local</p>	<p style="text-align: right;">585</p> <p>1 relationship between the local rating and the</p> <p>2 distant viewership figure because the predicted</p> <p>3 distant viewership figure is a product of the</p> <p>4 imputed local viewership rating.</p> <p>5 Now, one of the most interesting</p> <p>6 things, I think, that happened at the hearing</p> <p>7 last month was, toward the end of his testimony</p> <p>8 on cross-examination, Dr. Gray made a</p> <p>9 remarkable admission that his methodology does</p> <p>10 not measure relative market value according to</p> <p>11 the CSO or SSO's criteria but, rather, he said,</p> <p>12 that relative market value corresponds to the</p> <p>13 price that -- excuse me -- that the relative</p> <p>14 market value corresponds to what an owner of</p> <p>15 content would sell their program to a</p> <p>16 broadcaster of such content as opposed to a</p> <p>17 CSO.</p> <p>18 I think, if I'm quoting correctly,</p> <p>19 Gray said the relative market value corresponds</p> <p>20 -- no, strike that. That was in his written</p> <p>21 statement.</p> <p>22 But the result is that Gray actually</p> <p>23 constructed his methodology on the incorrect</p> <p>24 assumption that the willing seller is the</p> <p>25 copyright owner and the willing buyer is a</p>

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1 broadcast station, not a cable system operator
2 or a satellite system operator.

3 His methodology basically is not
4 hitting the mark here because, of course, the
5 broadcaster is not the end result. In an
6 unregulated market, the copyright owner is
7 selling to the broadcaster, and then the
8 broadcaster is -- would license these, is what
9 Gray said. In other words, he was saying, oh,
10 I'm looking at this as the owner selling to the
11 broadcaster and then the broadcaster licensing
12 on to the CSO. That is not the construct that
13 we are required to look at here.

14 The construct we are required to look
15 at here is what would happen in a hypothetical
16 market when the owner of the content is selling
17 that content to the cable system operator? And
18 it's important because of the philosophical
19 focus at issue here. The philosophical focus
20 must be from the viewpoint of the cable system
21 operator and his decision upon what programs to
22 buy and what not to buy.

23 And the bottom line here is that they
24 have no reason to look at ratings when they do
25 that. A broadcaster has a reason to look at

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1 ratings when they do that because they are
2 selling advertising time and they want
3 something predicted with viewing.

4 The cable system operator or satellite
5 system operator is not generally selling any
6 advertising except for in rare, small
7 circumstances. They instead are trying to
8 attract subscribers.

9 So when Dr. Gray then comes back and
10 says, well, the highest currency in this
11 analysis is viewership, he's right, to the
12 extent he's focused on the wrong thing, i.e.,
13 what are the broadcasters' interests. And I
14 think that basically undermines his entire
15 testimony.

16 He's saying I'm focusing on
17 viewership. Viewership is the highest
18 currency. Viewership is what is important.
19 Because he has misidentified what his job was.
20 That's all correct if the buyer is the
21 broadcaster. It's not correct if the buyer is
22 a cable or satellite system operator.

23 He disagrees that Dr. -- he said he
24 disagrees with the prior rulings by the CARP
25 and the CRT that found that the Nielsen -- "the

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1 Nielsen study was not useful because it
2 measured the wrong thing." Again, his
3 rationale for that is that viewership is all
4 important. And, clearly, the reason he thinks
5 that is because he thinks he should be focusing
6 on a broadcaster's interest in programming, not
7 a CSO or SSO's interest in broadcasting.

8 Now, Dr. Gray also does some
9 interesting things in his analysis. He injects
10 a number of factors into his analysis that have
11 been ruled on previously by the Judges as being
12 factors that were impermissible or maybe not a
13 good idea to look at.

14 And he begins with this analysis to a
15 degree by saying that the Program Suppliers
16 category is relatively homogeneous. And,
17 actually, the way he then conducted his
18 methodology is based on assumption that it's
19 not homogeneous.

20 And I say that because what he does is
21 he puts in different values for different types
22 of programming. One value, for instance, under
23 health programming, he applies a coefficient of
24 negative 2.43; whereas for music programming,
25 he employs a positive coefficient of 0.90.

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1 Basically saying that, oh, all these homogenous
2 -- all these programs of Program Suppliers
3 category which are supposed to be homogenous
4 really aren't actually homogenous at all, and
5 different types of programming, some within the
6 category, are more valuable than others.

7 Then he also puts a -- throws another
8 variable in there, which is station
9 affiliation. He divides the stations into
10 three different categories, network, CW, and
11 independent, again with different coefficients
12 attached to each one of those.

13 For both those factors, the different
14 station affiliations and the different types of
15 programming, nowhere in his testimony does he
16 explain why he does these -- makes these
17 distinctions or why he should make these
18 distinctions or why these distinctions are --
19 should be in his analysis or should not. It's
20 just he throws them in and doesn't give any
21 explanation but does go out of his way to say
22 that they're very important and they're very
23 significant and they play a big part in the
24 overall value that he ends up assigning to the
25 parties here. Excuse me.

<p style="text-align: right;">590</p> <p>1 Now, let's focus for a minute on just 2 a couple comments about -- back to zero viewing 3 and that issue. Specifically, note that 4 Mr. Lindstrom acknowledges that zero viewing 5 goes on. Dr. Gray acknowledges that zero 6 viewing is there and is a problem, although he 7 tends to define it differently and tries to 8 change the nature of it in terms of his 9 explanation of how he deals with it or doesn't 10 deal with it. 11 But the bottom line is there's no 12 calculation of the levels of zero viewing in 13 the Nielsen data. And Mr. Lindstrom never 14 attempted to make that distinction or that 15 calculation, rather, nor was he ever directed 16 to. Nor does Dr. Gray. Despite the fact that 17 we have, you know, we have these high instances 18 of zero viewing. 19 In the '93 and '97 cable proceedings, 20 the Librarian found that 73 percent of distant 21 retransmissions had zero viewing and that it 22 varied station by station to station greatly. 23 In one point -- excuse me -- 8 of 82 stations 24 had zero viewing in 90 percent of their 25 broadcasts, including WCBS, the New York City</p>	<p style="text-align: right;">592</p> <p>1 calculation and analysis but never explained 2 why, and it wasn't explained in the MPAA's 3 papers either. 4 JUDGE BARNETT: Mr. Boydston, excuse 5 me, just so you know, you are at 50, 5-0, 6 minutes at this time. 7 MR. BOYDSTON: Yes, thank you. I 8 appreciate that. At this point, I will -- I 9 will conclude for the moment and save that five 10 minutes. I think the points have been 11 sufficiently raised so I'll pass the baton and 12 retain that five minutes. Thank you. 13 JUDGE BARNETT: Actually, I said 50, 14 as in 5-0. You have ten minutes. 15 MR. BOYDSTON: Oh, thank you, Your 16 Honor. Well, that's great. Then I'll -- thank 17 you. Then I'll retain the ten minutes. 18 JUDGE BARNETT: Great. Thank you. 19 We are not going to take a noon 20 recess. We're going to go ahead and finish 21 everyone's rebuttal before we break for the 22 day. 23 So, Mr. MacLean? 24 MR. MacLEAN: Thank you, Your Honor. 25 JUDGE BARNETT: And you do have five</p>
<p style="text-align: right;">591</p> <p>1 affiliate. So it just dramatizes the extent of 2 the problem of zero viewing when you have the 3 CBS affiliate in the largest city in the 4 country generating zero viewing 52 percent of 5 the time. 6 And Mr. Lindstrom says, you know, he 7 actually knows that zero viewing instances have 8 increased over time. Dr. Gray agrees in a 9 sense, saying there is a reasonably high 10 instance of zero viewing in not just the 11 2000-2003 data, but also in this "new Nielsen 12 data" for 2008-2009. So the problem is 13 pernicious and not addressed and not 14 calculated. 15 Dr. Gray said he had not calculated 16 the instance of zero viewing for the 2000-2009 17 local ratings data. He acknowledged that 18 there's only 16 weeks of sweeps available with 19 -- and 80 percent of that has zero viewing, and 20 that for the remaining 36 weeks, there's no 21 data whatsoever. 22 When you put those calculations 23 together, as I said, it adds up to 94 percent 24 zero viewing across the board. 25 Dr. Gray disagreed with that</p>	<p style="text-align: right;">593</p> <p>1 minutes. 2 MR. MacLEAN: Thank you. I thought it 3 was seven. 4 JUDGE BARNETT: Oh, you're right. I 5 stand corrected, you have seven minutes. 6 MR. MacLEAN: Thank you, Your Honor. 7 REBUTTAL ARGUMENT BY COUNSEL FOR 8 SETTLING DEVOTIONAL CLAIMANTS 9 MR. MacLEAN: Okay. So I first want 10 to respond to this point relating to the 11 difference between Phase I and Phase II. It is 12 a point that Mr. Boydston has made before, and 13 this time he did go through some of the reasons 14 why there is, in fact, a difference between 15 Phase I and Phase II. 16 And the bottom line is in Phase I, 17 we're talking about non-homogeneous programming 18 that's directed toward different audience 19 segments, different segments of potential 20 subscribers and actual subscribers to attract 21 and retain them. 22 In Phase II, we are to a greater 23 degree predominantly dealing with more 24 homogeneous programming directed to the same 25 audience. And that's certainly true within the</p>

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1 Devotional category.

2 JUDGE STRICKLER: You say to a degree.
3 It sounds like you and Mr. Boydston are not
4 really disagreeing in that there's no sharp
5 line between categorization and homogeneity of
6 programming, but I assume that you would agree
7 with that, but tell me if you don't.

8 MR. MacLEAN: Well, I certainly agree
9 there's not a sharp line and that's true for
10 many, many things that nevertheless we have to
11 make judgments about. However --

12 JUDGE STRICKLER: That's where I
13 thought you were going. Your point is that the
14 categorization, the demarcation has been made
15 between allocation and distribution proceedings
16 and we should maintain that wherever that
17 degree of homogeneity is sufficient to make the
18 cleave, we should make the cleave? Continue to
19 make the cleave?

20 MR. MacLEAN: Yes, you should and
21 cable system and satellite system operators
22 also draw that distinction. And that is in the
23 record.

24 Mr. Boydston raised the possibility,
25 well, what about, you know, the difference

1 this exact question, and I will read it:

2 "Judge Strickler: I have a question
3 for you." This is on pages 82 to 83. "I have
4 a question for you. When you look at religious
5 programming at a particular -- as a particular
6 niche, you say you relied on ratings
7 predominantly to decide which ones would be
8 most attractive; is that correct?

9 "The witness: Yes.

10 "Judge Strickler: Did you ever do any
11 sub-niche work, so as to distinguish between
12 whether or not you wanted more evangelical
13 religious programming or more Catholic
14 programming? I noticed you mentioned something
15 from the University of Notre Dame in your
16 testimony. Did you ever get that granular
17 within religious programming or you treated all
18 religious programming as homogeneous for
19 purposes of making your business decision?

20 "The Witness: For the religious
21 programming, I treat it as pretty homogeneous.
22 And I relied on the ratings information to tell
23 me what was the most popular in those DMAs or
24 out-of-market DMAs.

25 "Judge Strickler: Thank you."

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1 between Christian programing and Muslim
2 programming and so forth? Well, you know what,
3 from my perspective, there should be Muslim
4 programming. I wish there were Muslim
5 programming. And if there were, we would hope
6 that they would join the Settling Devotional
7 Claimants, and we would -- I would understand
8 the argument that maybe we would need, you
9 know, to address that methodologically to
10 distinguish the fact that those are addressed
11 towards different audience segments. But
12 that's not the case here, and IPG has
13 introduced no evidence whatsoever.

14 We do have evidence to the contrary,
15 that Devotional programming, in particular, in
16 this proceeding, is particularly homogeneous.
17 You can find this in Exhibit 7001, that's
18 Mr. Sanders written direct testimony, on page
19 17, where he makes the point that the
20 Devotional programs claimed in this proceeding
21 are predominantly Christian programs and are
22 regarded as homogeneous.

23 Probably more to the point, if you
24 look at Exhibit 7003, which is Ms. Berlin's
25 oral testimony, you, Judge Strickler, asked you

1 So this is directly addressed in our
2 evidence. IPG has no evidence on this -- on
3 this subject.

4 Ms. Berlin's testimony was not
5 contradictory. She acknowledged, yes, you need
6 those niche programs to attract different
7 market segments, but when you're looking within
8 a niche, you want that, the programming that's
9 going to attract the largest portion of that
10 market segment, and that's why at this level
11 when you're talking about homogeneous
12 programming, why we look at -- why Ms. Berlin
13 looks at ratings, why Mr. Sanders looks at
14 ratings for appraisal purposes. That's on the
15 general theoretical discussion about why
16 ratings matter in Phase II and why it's less
17 important in Phase I.

18 Now to go to our particular data that
19 we, the Settling Devotional Claimants, rely on.
20 Mr. Boydston said we're mixing data sets
21 because we use HHVH as sort of a confirmatory
22 analysis.

23 No, we do not mix data sets. Our
24 methodology relies on local -- on average local
25 ratings scaled by the number of distant

<p style="text-align: right;">598</p> <p>1 subscribers. That's our methodology. 2 When we use the HHVH data, the distant 3 HHVH data, it is for analysis to confirm the 4 experience and expertise of those industry 5 witnesses that we have who, based on their own 6 experience and their own common sense and their 7 own understanding of the market, tell us we can 8 use local ratings to make predictions about how 9 programs will perform in neighboring markets. 10 We just want to make sure that those 11 -- that these -- that the conventional wisdom 12 isn't out to lunch because sometimes 13 conventional wisdom is wrong. And so that's 14 why we relied initially on only 1999 HHVH data 15 because that's all we had at the time. Now we 16 rely on 1999 to 2003 data, not for our 17 methodology, not to calculate shares, but 18 solely to do hypothesis tests. And a 19 hypothesis test in statistics is a -- it means 20 something specific. It means a test of the 21 usually null hypothesis to see is there a 22 correlation and is it an actual correlation or 23 just chance. 24 And that's what we -- that's exactly 25 what Dr. Erdem has done, several regressions</p>	<p style="text-align: right;">600</p> <p>1 programs. What often happens is you'll have a 2 regularly scheduled Devotional program and then 3 they'll have like a Christmas special, an 4 Easter special, other things that are in 5 support of that program. 6 And so, again, there's just no -- 7 there's no evidence of viewership of those 8 programs. There's no evidence of value. If 9 IPG had evidence, they should have presented 10 it. And I see by the look on your face, Your 11 Honor, that I'm out of time. 12 JUDGE BARNETT: You are out of time, 13 Mr. MacLean. 14 MR. MacLEAN: Thank you. 15 JUDGE BARNETT: You're very intuitive. 16 Mr. Olaniran. You have 25 minutes 17 reserved. 18 MR. OLANIRAN: Thank you. I'm hoping 19 I don't have to use all of them. 20 REBUTTAL ARGUMENT BY COUNSEL FOR 21 MPAA-REPRESENTED PROGRAM SUPPLIERS 22 MR. OLANIRAN: Most of the arguments 23 that Mr. Boydston argued, we've covered, I 24 think, adequately in our response to IPG's 25 proposed findings, so I just want to address a</p>
<p style="text-align: right;">599</p> <p>1 showing that correlation is positively and 2 statistically significantly -- that the local 3 ratings are positively and statistically 4 significantly related to the distant viewership 5 information that we have for those years that 6 we have it, and also that it does not degrade 7 over time and doesn't vary from year to year. 8 But viewing levels vary from year to year over 9 time because there are changes in the market. 10 But what Dr. Erdem's analysis would suggest, 11 consistent with the experience of Mr. Sanders 12 and Ms. Berlin, is that changes in the market 13 tend to affect local and distant viewing in 14 similar ways in similar directions. 15 Mr. Boydston says, well, we know there 16 are other retransmitted programs. Actually, 17 there's no evidence on that. What the record 18 shows is exactly six IPG-claimed broadcasts, 19 not programs, broadcasts in the 11 years at 20 issue in this proceeding that don't appear in 21 the -- in the data. 22 Now, I'm certainly not saying that 23 there aren't other programs that are missing. 24 I mean, we acknowledge that our RODPs in 25 particular only cover those regularly scheduled</p>	<p style="text-align: right;">601</p> <p>1 couple of what I think are probably the ones 2 that stood out. 3 I think Your Honor asked the question 4 earlier about the criticism that Dr. Gray 5 supplanted the actual Nielsen viewing data with 6 his projected viewing data. And I had a minute 7 to -- and I think Mr. Boydston also made the 8 same argument a few minutes ago. And so two 9 things occurred to me, having had a chance to 10 think about it a little bit. 11 The first was that the MPAA -- the 12 Nielsen data that was provided to us was based 13 on the larger NPM database analysis. And then 14 you have Dr. Gray's analysis, which was a 15 projection using all the various -- the 16 different variables within the regression input 17 to project an overall. 18 So, in essence, what would have 19 happened is that you would have had two 20 different results, two different methodologies 21 that you would have had to -- you would have 22 been using in presenting overall results. And 23 I think that would have been somewhat of 24 a challenge. That's the first point. 25 The second point is that, in the</p>

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1 2000-2003 decision, Dr. Gray tested the
2 supplant methodology as to whether -- what the
3 outcome could be. And I think the outcome
4 would have favored MPAA.

5 And the reason that's important is
6 that in that proceeding, the 2000-2003 diary
7 data that we're relying on in this proceeding
8 is the same as the 2000-2003 diary data that
9 was used in that proceeding, and Dr. Gray
10 accurately makes a note of that in a footnote
11 in his testimony. And I think in -- I think
12 the cite to that decision is 78 FR 64996 with
13 respect to the portion of the decision that you
14 addressed that issue.

15 With respect to zero viewing in
16 Mr. Boydston's argument, he appears to be
17 conflating zero viewing levels between distant
18 signals and local ratings. I think both the
19 testimony of Mr. Lindstrom and Dr. Gray make it
20 clear that there's actually very little amount
21 of zero viewing with respect to local ratings.
22 So I think -- in that argument, I think
23 Mr. Boydston was just flat wrong about that.

24 And I'm actually surprised that we're
25 still -- that IPG is still debating zero

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1 viewing at this point, notwithstanding how
2 articulate the Judges were in the '00-'03
3 decision as to what zero viewing is and what it
4 really means. And as to multiple testimony by
5 Dr. Gray and Mr. Lindstrom as to what zero
6 viewing means.

7 Zero viewing, according to
8 Mr. Lindstrom's testimony, it is meaningless to
9 focus on data points within a larger amount of
10 data. And zero viewing doesn't mean nobody is
11 watching. Zero viewing simply means it's not
12 recorded viewing. It is non-recorded viewing
13 within a sample, not the entire universe.

14 And he even gave a couple of examples
15 where -- I think it was the cable network
16 viewing, where he said about 65 percent, that
17 65 percent level of zero viewing and the 7
18 billion of advertising resting on that. And he
19 mentioned that in his testimony.

20 And Mr. Lindstrom also said that zero
21 viewing is to be expected because viewing of
22 distant signals, in general, is very low.

23 So, I mean, I hope we don't continue
24 to harp on this over and over again because I
25 think it has been beaten to death in multiple

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1 testimonies.

2 Mr. Boydston also said that --
3 basically says generally data -- there was
4 insufficiency of data. And he clearly ignores
5 the fact that in this further proceeding, we
6 have four additional sets of data, the '08 and
7 '09 cable and satellite.

8 And, as I mentioned earlier, this is
9 -- the amount of observations that were
10 available for Dr. Gray to perform his analysis
11 pretty much doubled by the addition of that
12 data.

13 So I completely disagree, we
14 completely disagree with the idea that we don't
15 have sufficient data. But to be quite clear,
16 if I were in IPG's shoes, I'd be arguing that
17 there isn't enough data. Of course, IPG has
18 not produced any testimony. They have not
19 produced any witness. They have not advocated
20 any particular methodology.

21 So it's rich sitting on the sidelines
22 watching all of the parties that have produced
23 a tremendous amount of data, expended several
24 amounts of resources to produce information,
25 notwithstanding the hardship that I think both

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1 MPAA and I believe SDC too have had to go
2 through to accurately produce something.

3 So for someone that didn't produce
4 anything, I find it really interesting that
5 they can sit on the sidelines and say, oh,
6 yeah, there's not enough data, let's go have
7 another proceeding or let's go have a special
8 master come up with a methodology to do it.
9 And I don't think legally we can do that. But
10 I just find it generally interesting that IPG
11 is taking that position.

12 JUDGE STRICKLER: When you say legally
13 we can't do it, are you making reference to the
14 special master proposal that he made?

15 MR. OLANIRAN: Yeah, and I don't know
16 anywhere in the statute that permits a special
17 master. Maybe Mr. Boydston knows, but I'm not
18 aware of how that would be done under the
19 current statutory provisions.

20 But, again, the idea that there's not
21 enough data is baffling. Not only the '08-'09,
22 we do have local ratings that run from 2000
23 through 2009 for all the stations in the
24 sample. I just -- I think it just shows a
25 complete lack of appreciation of what the

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1 parties that did make the effort to produce
2 information did.

3 JUDGE STRICKLER: Well, the effort
4 alone wouldn't be sufficient. The effort has
5 to be sufficient to be able to show, with some
6 reliability, or the three C's as Mr. MacLean
7 utilizes, that it's persuasive enough for us to
8 rely on. And he's -- while Mr. Boydston's
9 client did not and Mr. Boydston did not produce
10 any evidence contrary, if their
11 cross-examination is otherwise effective to
12 show that you didn't meet whatever threshold we
13 require, we would be back in the same ballpark
14 as we were back before May of 2016, right?

15 MR. OLANIRAN: I don't disagree with
16 it. My argument is not just that the effort
17 was extraordinary. I think the effort actually
18 answered the questions that Your Honors asked
19 us, and what would have been nice was -- would
20 have been to see IPG actually present evidence
21 in this proceeding that actually justified
22 whatever position they're advocating, which no
23 one knows at this point.

24 JUDGE STRICKLER: And it would have
25 been nice for you to see it?

1 cable and satellite compulsory licenses, are
2 administered. They are not a function of the
3 market. Aggregate of program categories are
4 not a function of the market in the sense that,
5 you know, there's no evidence in this record
6 that people go out in the market and say, well,
7 okay, you know, we have Devotional programs
8 that's worth a showing. Individual programs,
9 the statute provides for compensation of
10 copyright owners, and copyright owners have
11 works, and the question is what is the value of
12 each work, whether it's in aggregate form or
13 individual form?

14 And, by the way, Mr. Boydston referred
15 to this '93-'97 Phase II decision by the
16 register. That decision, even though we
17 pointed out during the proceeding that it's now
18 vacated, that decision actually says that
19 viewership, viewing should be used in Phase I,
20 not Phase II.

21 So we're sort of caught in the middle,
22 but I think from our approach, we're very
23 consistent that viewing is the core metric for
24 valuing programs, whether you do it on an
25 individual basis, which our methodology allows

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1 MR. OLANIRAN: Yes.

2 With regard to the Phase I versus
3 Phase II argument and as to whether or not --
4 whether or not viewing is better in one phase
5 versus the other in all of the proceedings that
6 have gone on before the Judges, for MPAA, we
7 have been very consistent with regard to the
8 methodological approach. Whether it's Phase I
9 or Phase II, we have always based our
10 methodology or our approach to allocation of
11 royalties on some sort of -- some type of
12 viewer-based -- viewership-based approach.

13 And reason that -- at the core of
14 that, of that approach, is that we don't see
15 any basis in economics or in law for why there
16 should be a different methodology for when you
17 aggregate individual programs versus when
18 you're trying to price -- when you're looking
19 at individual programs.

20 The core standard is relative market
21 value of the programming, and so we don't make
22 the distinction whether it's Phase I or Phase
23 II, because Phase I or Phase II or allocation
24 or distribution phases are basically a product
25 of how the compulsory licenses, at least with

1 you to do, or whether you do it on an aggregate
2 basis.

3 But, again, for -- you know,
4 Mr. Boydston criticized Dr. Gray's approach,
5 which he claims -- which Mr. Boydston claims is
6 on an incorrect assumption that the buyer of
7 the content is the broadcaster. I don't -- I
8 haven't heard or there is nothing in the record
9 about what IPG's market theory is. There is
10 nothing in the record about who is the buyer.
11 There is nothing in the record, at least from
12 IPG's perspective, who the seller is, what type
13 of market they're in, and so on and so forth.

14 So it's very easy to make such
15 criticism when you don't have it in the record.

16 I think with that I will rest. Thank
17 you, Your Honors.

18 JUDGE BARNETT: Thank you,
19 Mr. Olaniran.

20 Mr. Boydston, you have ten minutes.

21 MR. BOYDSTON: Thank you, Your Honor.

22 REBUTTAL ARGUMENT BY COUNSEL FOR
23 INDEPENDENT PRODUCERS GROUP

24 MR. BOYDSTON: You know, the thought
25 that came to me here in just these last few

<p style="text-align: right;">610</p> <p>1 minutes was, my gosh, this has been going on 2 for something like 25 years. And when I say 3 this has been going on for 25 years, the 4 struggle to arrive at a viewership-based 5 methodology has been going on at least that 6 long. I mean, you know, some of the earliest 7 decisions on this point were actually published 8 in the Federal Register in early '90s. 9 Some of the more rigorous analysis was 10 done, you know, ten years after that, and less 11 than ten years after that. And the bottom line 12 is what has happened over that period of time? 13 We find ourselves basically right in the same 14 spot. 15 You, the Judges, in ruling on the 16 first round in these proceedings said, you know 17 what, both of these methodologies have data 18 problems and we need something more. 19 And what have you got? It's before 20 you. You didn't get much. And the question 21 then becomes if you go ahead and say, well, you 22 know what, we're just going to have to plow 23 forward here and we're not going to make the 24 parties go back to the drawing board, we've got 25 to move forward, this has gone on forever,</p>	<p style="text-align: right;">612</p> <p>1 a conundrum that is not well served by going 2 ahead and saying, well, yeah, we had problems 3 with these things, and, you know, we're just 4 going to go ahead and accept them anyway. 5 With regard to more specific matters, 6 with regard to the issue of homogeneity and 7 Ms. Berlin's testimony, let's remember that -- 8 the limitations on Ms. Berlin. One of the 9 things that I don't know if I pointed out to 10 begin with or not, but DirecTV did not have any 11 formal relationship with Nielsen at the time 12 that she worked there. They didn't have any 13 regular supply of ratings information. 14 When they did obtain ratings 15 information, it was only -- it was local 16 broadcast ratings, information acquired after 17 -- from a variety of sources with ratings on 18 the local broadcasts, not the distant 19 retransmitted broadcasts. 20 So when she gives her testimony, 21 that's the basis of it. It's not analogous -- 22 it's not applicable here. It's inapposite. 23 It's local retransmissions, not distant 24 retransmissions. 25 And that's a distinction with a</p>
<p style="text-align: right;">611</p> <p>1 we're going to go ahead and, you know, grit our 2 teeth and say, okay, our questions weren't 3 really answered, we don't feel like we were -- 4 our demands were satisfied in terms of the data 5 available or the data that we would like to 6 see, we're going to issue a ruling anyway. 7 Well, we all know where this will end 8 up. It will end up in the Court of Appeals. 9 And then the question for the Court of Appeals 10 -- that will be made to the Court of Appeal 11 will be: Well, the Judges issued this, these 12 critiques. Here is the answer. 13 And if you go ahead and approve these 14 methodologies anyway, what we'll be saying to 15 the Court of Appeal is the Judges raised these 16 critiques; this is the response, which is half 17 a loaf or worse, and they went ahead and issued 18 a distribution anyway. That seems arbitrary. 19 That seems like it ought to be reversed. 20 You know, would the Court of Appeals 21 reverse? Who knows. But that's kind of what 22 we're looking at here. 23 And so I think, you know, from a big 24 picture standpoint, that's the conundrum before 25 Your Honor, Your Honors, and I think that it's</p>	<p style="text-align: right;">613</p> <p>1 difference because, you know, in the 2 circumstances in which you're looking at 3 distant retransmissions, you're talking about 4 different types of communities. And, 5 generally, you're speaking probably smaller 6 population groups where your niche programming 7 demands are going to be unique in the sense 8 that if you've got a small cable system with 9 10,000 subscribers, but you happen to be in a 10 place in the country where there are a lot of 11 Lithuanians living, that's going to skew your 12 decision-making. 13 With regard to Mr. MacLean's point 14 about, you know, that there's testimony that 15 most of the Devotional programming is 16 Christian, okay, that's true, and Christian, 17 you know, but within Christianity, we all know, 18 there are very, very different types of -- 19 well, there are very different religious groups 20 within Christianity, with different types of 21 styles of preaching, different, you know -- I 22 don't want to get too intense on this because 23 it's religion and it's a sensitive subject. 24 But the fact of the matter is that 25 it's not simply a situation saying, well, it's</p>

<p style="text-align: right;">614</p> <p>1 homogeneous because it's all Christian. There 2 is a big difference between many Baptist 3 churches and the way they work and Catholic 4 churches and the way they work. 5 And I submit to you that I think it's 6 common sense that their programming is probably 7 different as well and reflects that. And it's 8 not homogeneous. 9 So, again, I think that it does make 10 sense to look at these kind of issues in Phase 11 II because if you're a cable system operator 12 and you're in a community that has, say, a 13 large Lutheran contingent, you may want to 14 choose -- your motivation in rebroadcasting a 15 religious program might be that you'll 16 rebroadcast a low-rated Lutheran program as 17 opposed to a higher-rated Catholic program 18 because, again, what you're after is 19 subscribers, not selling doughnuts on TV. 20 So I think that that's consistent with 21 common sense and with what we have in front of 22 us here. 23 Quickly, on the -- Mr. Olaniran made 24 the point or referred to the decision that was 25 vacated in the earlier proceeding. Yes, that</p>	<p style="text-align: right;">616</p> <p>1 that he's focusing on that relationship instead 2 of the relationship that the law says we have 3 to focus on, which is between the owner of 4 content and the cable system operator or 5 satellite system operator. 6 I think that testimony and that focus 7 is fatal to Dr. Gray's philosophical approach 8 and to his devotion to viewership. And I think 9 based on that, that is another very good reason 10 to be suspicious or to be cautious or not want 11 to embrace a viewership-based methodology. 12 And with that, I have nothing further, 13 and I thank the Judges for their attention and 14 their diligent work on this matter. 15 JUDGE BARNETT: Thank you, 16 Mr. Boydston. 17 Before we close up, I offer an apology 18 to everyone, in particular Ms. Blaine. I know 19 that you have probably all corresponded with 20 her, but I failed to acknowledge that she is 21 here today as our hearing room clerk, and we 22 appreciate her filling in. And I hope you had 23 a chance to meet her in person. 24 And with that, I will say thank you to 25 you all for your diligence. It is, I think,</p>
<p style="text-align: right;">615</p> <p>1 decision was vacated. 2 However, in the decision the Court -- 3 the panel, rather, said, yes, we're vacating 4 this decision because this matter has been 5 settled, but that does not change or should not 6 diminish the impact or the importance of our 7 observations in this decision, i.e., the 8 observations that they made in those decisions. 9 It's a small point but, yes, it was 10 made a lot in the papers, and I just want to 11 point out, despite the fact that that decision 12 was vacated, the logic of it was not by the 13 very language used by the panel when it wrote 14 the decision. 15 I think the final point I'd like to 16 make is with regard to the MPAA. Again, 17 Dr. Gray is looking at the wrong thing. 18 Dr. Gray admitted on the stand under oath that 19 his -- that he is looking at the construct in 20 which an owner of copyright is selling their 21 material to a broadcaster. And consistent with 22 that, he said, that's why viewership is 23 paramount because, of course, viewership is 24 paramount to a broadcaster. 25 The gross mistake that he has made is</p>	<p style="text-align: right;">617</p> <p>1 our shared hope that we can bring this matter 2 to a conclusion without further delay, further 3 undue delay. And it is our mission to tackle 4 this consolidated proceeding and all of the 5 evidence we now have before us and to see if we 6 can bring it to a close. Thank you again. 7 And we are adjourned. 8 (Whereupon, at 12:20 p.m., the hearing 9 concluded.) 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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C E R T I F I C A T E

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

5/30/18 Karen Brynteson
Date : Signature of the Court Reporter

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